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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED JANUARY 31, 1947.

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[fol. 4]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil No. 46C 275

Equitable Relief Sought

THE BALTIMORE and OHIO RAILROAD COMPANY, THE CHESAPEAKE and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, Plaintiffs,

vs.

THE CHICAGO RIVER and INDIANA RAILROAD COMPANY, CHICAGO Junction Railway Company, and The New York Central Railroad Company, Defendants

COMPLAINT—Filed February 12, 1946

Now come The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company and Wabash Railroad Company, plaintiffs, and [fol. 5] complain of The Chicago River and Indiana Railroad Company, Chicago Junction Railway Company, and The New York Central Railroad Company, defendants; and plaintiffs respectfully state to the Court:

1. Plaintiffs are corporations organized and existing by virtue of the laws of the following states respectively: The Baltimore and Ohio Railroad Company, Maryland; The Chesapeake and Ohio Railway Company, Virginia; Erie Railroad Company, New York; Grand Trunk Western Railroad Company, Michigan and Indiana; The New York, Chicago and St. Louis Railroad Company, New York, Penn-

slvania, Ohio, Indiana and Illinois; The Pennsylvania Railroad Company, Pennsylvania; Pere Marquette Railway Company, Michigan; Wabash Railroad Company, Ohio.

2. Plaintiffs respectively operate certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and are common carriers engaged in the transportation of property (including livestock) by railroad between Chicago, Illinois, and points in other states of the United States and as such are subject to Part I of the Interstate Commerce Act, Tit. 49, U. S. Code, Secs. 1-27.

3. Defendant, The Chicago River and Indiana Railroad Company (herein called the River Road), is a corporation organized and existing by virtue of the laws of the State of Illinois, and operates a line of railroad serving the Union Stock Yards, Chicago, Illinois, and connecting at Chicago, Illinois, with plaintiffs' respective lines of railroad and with the line of railroad of The New York Central Railroad Company, one of the defendants herein, referred to in paragraph 5 hereof, and is a common carrier engaged in the transportation of property (including livestock) by railroad (in connection with various connecting common [fol. 6] carriers by railroad, including plaintiffs and defendant, The New York Central Railroad Company, as their various routes may run) between said Union Stock Yards, Chicago, Illinois, and points in other states of the United States and as such is subject to Part I of the Interstate Commerce Act.

4. Defendant, Chicago Junction Railway Company (herein called the Junction), is a corporation organized and existing by virtue of the laws of the State of Illinois, and owns certain lines of railroad and leases certain other lines of railroad serving said Union Stock Yards, which lines (owned and leased) are leased to and operated by the River Road, and as such is subject to Part I of the Interstate Commerce Act.

5. Defendant, The New York Central Railroad Company (herein called the Central), is a corporation organized and existing by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and operates certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and is a common carrier engaged in the transportation of prop-

erty (including livestock) by railroad between such points and as such is subject to Part I of the Interstate Commerce Act.

6. This is a suit of a civil nature arising under paragraphs (18), (19) and (20) of section 1, paragraphs (2) and (4) of section 5, section 8, and section 9 of Part I of the Interstate Commerce Act for enforcement of an order of the Interstate Commerce Commission issued under and pursuant to paragraph (2) of section 5 of said Part I, for specific performance of a certain agreement arising out of said order, for damages for violation of said order and of said agreement, and to enjoin violation of paragraphs [fol. 7] (18) to (20) of section 1 and of paragraphs (2) and (4) of section 5 of said Part I. Jurisdiction of this Court is conferred by paragraph (12) of section 16 of Part I of the Interstate Commerce Act and by paragraph 8 of section 41 and by section 43 of Title 28, U. S. Code.

7. On May 16, 1922, and for many years prior thereto, in conformity with and pursuant to the traffic and operating relationships in effect between plaintiffs respectively and the Junction and the River Road, plaintiffs moved empty livestock cars used for the loading of livestock other than hogs and sheep (herein called stock cars) with their own power and crews from their respective lines, via their respective connections with the line of the River Road, to places of loading on the line of the River Road in said Union Stock Yards and, after they had been loaded by shippers, moved said cars from said places of loading with their own power and crews over the line of the River Road, via its connections with their respective lines, to and over said lines as consigned and routed by the shippers. For the privilege of so moving said cars plaintiffs respectively, on and immediately prior to May 16, 1922, paid the River Road and the River Road accepted $1.00 per car, loaded and empty.

8. On December 28, 1920, the Central filed with the Interstate Commerce Commission (herein called the Commission) its application for approval, *inter alia*, of the following proposed transactions:

"(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;

"(b) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity;"

[fol. 8] the proceeding on which application was known and described on the docket of the Commission as *Chicago Junction Case*, Finance Docket No. 1165. On May 16, 1922, the Commission made and entered a report and order in said proceeding, which are reported in 71 I. C. C. at pages 631-650, a copy of which, marked Exhibit A, is attached to this complaint and by this reference made a part hereof.

By said report and order the Commission approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows (71 I. C. C. p. 650):

"That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive."

The conditions so referred to included the following condition (71 I. C. C. p. 639):

"3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central."

After having enumerated the foregoing conditions in said report, the Commission made the following finding (71 I. C. C. p. 641):

[fol. 9] "Subject to the observance of the above conditions, we find that the acquisition by the Central of

the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

Said report and order were duly served on defendants and each of them on May 18, 1922.

9. On May 19, 1922, pursuant to the approval and authorization granted in said order of May 16, 1922, the Central acquired control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000, and the River Road acquired control of the property (owned and leased) of the Junction by lease. Said control of the River Road by the Central and of the property of the Junction by the River Road has continued from that date down to the present time and is still in effect. By virtue of such acquisition of control on May 19, 1922, the Central, the Junction and the River Road became obligated to abide by the conditions enumerated in said report and order of May 16, 1922, and, by operation of law, an agreement came into effect between the Central, the Junction and the River Road on the one hand and plaintiffs and other common carriers by railroad similarly situated on the other hand to abide by said conditions.

10. On December 3, 1928, the Commission made and entered its report on further hearing and order in said *Chicago Junction Case*, which report and order are reported in 150 I. C. C. at pages 32-38, a copy of which, marked Exhibit B, is attached to this complaint and by this reference made a part hereof. By said report on further hearing and order the Commission amended condition 14 of its report and order of May 16, 1922. Said report on further hearing and order were duly served on defendants and each [fol. 10] of them on the 14th day of December, 1928. As so amended said report and order of May 16, 1922, are still in full force and effect.

11. On January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain proceeding then pending in said Court *entitled The Baltimore & Ohio Railroad Company et al. v. United States of America et al.*, In equity No. 3427, to which proceeding all of the plaintiffs herein or their respective predecessors in interest and all of the defendants

herein were parties, entered a final decree, copy of which, marked Exhibit C, is attached hereto and by this reference made a part hereof. By said decree said Court found and decreed with respect to the Commission's said order of May 16, 1922, as follows:

> "and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties."

12. From May 19, 1922, to the present time the Central has had and now has control of the traffic and operating relationships existing between the Junction and the River Road on the one hand and plaintiffs respectively on the other hand.

13. On or about January 25, 1946, notwithstanding their having become obligated and having agreed to abide by the conditions enumerated in said report and order of May 16, 1922, as amended, the Central and the River Road notified plaintiffs that on and after February 1, 1946, plaintiffs would not be permitted to continue to move stock cars as set forth in paragraph 7 hereof and that such cars, when destined to places of loading on the line of the River Road [fol. 11] in said Union Stock Yards, would be moved by the power and crews of the River Road from points of interchange with plaintiffs respectively on the line of the River Road to such places of loading and, after they had been loaded at such places of loading by shippers, would be moved thence by the power and crews of the River Road to points of interchange with plaintiffs respectively on the line of the River Road, and that at such points they would be delivered by the River Road to plaintiffs respectively, and that, upon the taking effect on February 1, 1946, of the aforesaid change in traffic and operating relationships, instead of the charge of $1.00 per car, loaded and empty, theretofore paid by plaintiffs respectively to the River Road and accepted by it in full payment for the right to move such cars as described in paragraph 7 hereof, the River Road would demand and exact from plaintiffs respectively $12.96 per outbound loaded car as a division of

the joint through rates on carload shipments of livestock other than hogs and sheep from said Union Stock Yards to destinations reached via plaintiffs' respective lines, pursuant to Chicago Switching Committee Division Sheet No. 12-J, issued by R. G. Raasch, Agent, effective June 1, 1945.

14. After having been notified on or about January 25, 1946, as alleged in paragraph 13 hereof, plaintiffs and each of them made written protest to the Central and the River Road objecting to the change in traffic and operating relationships between the Junction and the River Road on the one hand and plaintiffs on the other hand, referred to in paragraph 13 hereof, and demanding that the traffic and operating relationships theretofore in effect be continued.

15. Pursuant to the notification referred to in paragraph 13 hereof, on and at all times since February 1, 1946, the Central and the River Road have caused the employees of the River Road to fail and refuse and the employees of [fol. 12] the River Road have failed and refused to throw the switches necessary to permit the power and crews of plaintiffs respectively to place stock cars at loading places on the line of the River Road in said Union Stock Yards and to move said cars from said loading places in accordance with the traffic and operating relationships between the Junction and the River Road on the one hand and plaintiffs respectively on the other hand theretofore in effect, and have required plaintiffs' respective crews to place empty stock cars in an interchange yard on the line of the River Road which yard is used by plaintiffs respectively and the River Road for the interchange of cars, and have required plaintiffs respectively to receive such cars, after the same had been loaded by shippers, at other points on the line of the River Road, and said cars have been moved by the power and crews of the River Road from said interchange yard to points of loading on the line of the River Road in said Union Stock Yards and, after having been there loaded by shippers, back to other points on the line of the River Road, where they have been and are delivered by the River Road to plaintiffs respectively. At all times on and since February 1, 1946, the Central and the River Road have failed and refused and still continue to fail and refuse to permit plaintiffs to move stock cars as set forth in paragraph 7 hereof.

16. The movement of stock cars on the line of the River Road as required by the Central and the River Road on and since February 1, 1946, does not involve fewer hours of service by the power and crews of plaintiffs respectively than such movement of said cars as performed respectively prior to February 1, 1946.

17. The action of the Central and the River Road, referred to in paragraph 15 hereof, constituted and constitutes a violation of the Commission's said order of May 16, [fol. 13] 1922, as amended, and of the agreement of the Central, the Junction and the River Road arising out of said order, and of paragraphs (18) to (20) of section 1 and of paragraphs (2) and (4) of section 5 of Part I of the Interstate Commerce Act.

18. Said Union Stock Yards is the largest livestock market and the largest shipping point of livestock in the world and plaintiffs are and have been for many years the principal carriers engaged in the transportation of livestock therefrom to points in the United States east and southeast of Chicago, and plaintiffs have spent large sums in advertising and publicising their said service and in creating and maintaining good will towards the same on the part of shippers and receivers thereof and other persons interested in such transportation.

19. The change in traffic and operating relationships between the River Road and plaintiffs respectively, referred to in paragraph 15 hereof, has had and has and will have the effect of delaying the placing of empty stock cars furnished by plaintiffs respectively for loading at loading points on the line of the River Road in said Union Stock Yards and of delaying the movement of such cars after they have been loaded from such points of loading to points of interchange with plaintiffs' respective lines, with the result that the movement of outbound livestock other than hogs and sheep and other shipments of livestock of every kind moving in the same trains therewith from said Union Stock Yards over plaintiffs' respective lines has been substantially delayed; and some such shipments, as a result of such delay, will require unloading for rest, water and feeding in addition to such unloading as they would otherwise have required in order to avoid violation of the so-called 28-hour law (Title 45, U. S. Code, Secs. 71-74); and said

delays in the placement of such cars for loading and in the [fol. 14] movement of loaded cars and said prospective additional unloading for rest, water and feeding will result in substantial delays in the delivery at destination of such shipments and other shipments of livestock of every kind moving in the same trains therewith whereby some of said shipments will miss the markets for which they would have arrived in time had not such change in traffic and operating relationships been made.

20. By changing the traffic and operating relationships existing between the River Road and plaintiffs respectively prior to February 1, 1946, as alleged in paragraph 15 hereof, the Central and the River Road have deprived plaintiffs and each of them of the trackage rights over the line of the River Road to said Union Stock Yards which they theretofore enjoyed and of direct access to said Union Stock Yards for the transportation of livestock other than hogs and sheep from said Union Stock Yards to points in the United States east and southeast of Chicago, as a result whereof plaintiffs have been, are and will be prevented from dealing directly with the shippers of such livestock in placing and opening empty cars for loading, and in hauling out loaded cars, and have been, are and will be made dependent upon the Central and the River Road for the performance of said services for such shippers, with the result that plaintiffs are no longer able to see to the maintenance of such services at the high level of efficiency which was reached and maintained during the time when plaintiffs rendered said services directly, and as a further result of which plaintiffs are no longer able themselves to protect and enhance the good will which, prior to February 1, 1946, they had created among shippers and receivers of livestock other than hogs and sheep.

21. By reason of the unlawful acts set forth in this complaint plaintiffs respectively have been damaged and are being further damaged each day that said unlawful acts continue by reason of having been deprived of the track- [fol. 15] age rights over the line of the River Road which they formerly enjoyed as aforesaid and of direct access to said Union Stock Yards, and by reason of the aforesaid delays in the outbound movement from said Union Stock Yards, via plaintiffs' respective lines, of livestock and the

additional stops for rest, water and feeding, and the delays in arrival at destination and the missing of markets which will result therefrom, the value of plaintiffs' service in the transportation of livestock as aforesaid has been and will be greatly reduced and plaintiffs' good will has been and will be greatly damaged and injured. The money amounts of said damage to plaintiffs respectively are impossible of ascertainment.

22. By reason of the unlawful acts set forth in this complaint, in addition to the damage suffered by plaintiffs as alleged in paragraph 21 hereof, plaintiffs respectively have been damaged and are being damaged and will continue to be damaged each day that said unlawful acts continue in the amount of the difference between $2.00 and $12.96 per loaded car of livestock other than hogs and sheep moving from said Union Stock Yards via plaintiffs' respective lines, which, based on the year 1944 (the last year for which figures are available), amounts in the aggregate to approximately $675.00 per day.

23. The unlawful acts set forth in this complaint will, if continued, result in irreparable injury to plaintiffs and their respective property in this, that it will be impossible to determine in money the amount of the aforesaid injury to the value of plaintiffs' said transportation service and to plaintiffs' good will. In consequence thereof plaintiffs are without an adequate remedy at law and are entitled, under paragraph (12) of section 16 of Part I of the Interstate Commerce Act, to a writ of injunction to restrain defendants from disobedience of said order of the Commission and to enjoin upon them obedience to the same; and [fol. 16] are entitled to the aid of a court of equity to force defendants to comply with said agreement arising out of said order of the Commission, and to enjoin the further violation by defendants of paragraphs (18) to (20) of section 1 and paragraphs (2) and (4) of section 5 of Part I of said Act; and are entitled to a temporary injunction pending the final hearing in this cause.

Wherefore, plaintiffs pray:

(1) that until the final hearing of this cause a preliminary injunction issue out of this Court after hearing, restraining and enjoining said defendants and each of

them, their respective officers, agents, representatives, servants, employees and successors, and all other persons in concert and participating with them from

(a) failing and neglecting to obey said order of the Commission of May 16, 1922, as amended;

(b) violating condition 3 of said order of the Commission of May 16, 1922, as amended;

(c) breaching their agreement to abide by condition 3 of said order of the Commission of May 16, 1922, as amended;

(d) failing and refusing to permit plaintiffs respectively to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the line of the River Road to points of loading on said line in said Union Stock Yards and, after such cars have been loaded, so to move the same from said points of loading over the line of the River Road to plaintiffs' respective lines;

and commanding said defendants to permit plaintiffs respectively to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the line of the River Road to points of loading in said Union Stock Yards and, after having been loaded, from said points over the line of the River Road to plaintiffs' respective lines;

[fol. 17] (2) that after final hearing said injunction be made permanent;

(3) that judgment be entered for plaintiffs in the amounts in which they are found to have been damaged by the unlawful acts aforesaid after account stated; and

(4) that the Court grant such other and further relief as the plaintiffs may be entitled to in equity.

Dated at Chicago, Illinois, this 12th day of February, 1946.

The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St.

Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, (S.) by Ernest S. Ballard, their Attorney, 120 South La Salle Street, Chicago 3, Illinois.

(S.) Ernest S. Ballard, William F. Price, Pope & Ballard, 120 South La Salle Street, Chicago 3, Illinois, Randolph 6680, Attorneys for Plaintiffs.

[fols. 18-19] *Duly sworn to by J. M. Symes. Jurat omitted in printing.*

[fol. 20] EXHIBIT "A" TO COMPLAINT

Interstate Commerce Commission

Finance Docket No. 1165

Chicago Junction Case

Application of the New York Central Railroad Company for Approval of Purchase of Stock, Lease of Property, and Option to Purchase Stock or Property

Submitted April 5, 1922. Decided May 16, 1922

1. Acquisition by the New York Central Railroad Company of control of the Chicago River & Indiana Railroad Company, by the purchase of its capital stock, approved and authorized subject to certain conditions.

2. Acquisition by the Chicago River & Indiana Railroad Company of control of the Chicago Junction Railway by lease, approved and authorized subject to certain conditions.

3. Application of the New York Central Railroad Company for authority to purchase the capital stock or physical properties of the Chicago Junction Railway Company denied without prejudice to future proceedings.

Robert J. Crary and Sidney C. Murray for applicant.

Silas H. Strawn and Frederick C. Hack for Chicago Junction Railway Company and Chicago River & Indiana Railroad Company.

Luther M. Walter for intervening carriers.

Irving Herriott, Butler, Lamb, Foster & Pope, and E. S. Ballard for certain interveners.

C. G. Austin, Jr., for Belt Railway Company, and Walter L. Fisher for Chicago Railway Terminal Commission.

[fol. 21] REPORT OF THE COMMISSION

By the COMMISSION:

The New York Central Railroad Company, hereinafter termed the Central, a carrier by railroad subject to the interstate commerce act, on December 28, 1920, filed its application for approval of the following proposed transactions:

(*a*) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;

(*b*) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity;

(*c*) The granting to the Central by the Junction of an option to purchase all of the capital stock of the latter or all of the properties to be leased as last above set forth.

The application recites that it is filed pursuant to the provisions of paragraphs (18) to (22), inclusive, of section 1, and of paragraph (2) of section 5, of the interstate commerce act. No representations were made by any State authority for or against the granting of the application. Public hearings were held at Chicago and at Washington and all interested parties were given opportunity to be heard. At the opening of the hearing, interventions in opposition to the application were filed by the following trunk lines entering Chicago from the east and southeast: Baltimore & Ohio Railroad Company; Chesapeake & Ohio Railway Company; Chicago, Indianapolis & Louisville Railway Company; Chicago & Erie Railroad Company; Grand Trunk Western Railway Company; Pennsylvania Railroad Company; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and Wabash Railway Company. Two

groups of shippers also intervened, one in opposition to the application and the other taking a neutral position. In addition there were filed separate written indorsements of individual corporations and firms, comprising about 90 per [fol. 22] cent of the 400 shippers served by the Junction and the River Road, urging our approval of the proposed plan. About 30 of these indorsements were subsequently withdrawn. The Chicago Railway Terminal Commission was also represented during a portion of the hearings.

The record, which is voluminous, established the following facts: The territory served by the Junction and River Road lines is entirely within the so-called Chicago switching district, and is treated in the application as dividing naturally into five groups, of which two are of primary importance for the purposes of this proceeding, namely, the central manufacturing district and the stockyards group. The other three comprise the sections north from the stockyards to Fifteenth Street, east to Lake Michigan and southwest to Central Park Avenue, respectively, including what is known as the Kenwood manufacturing district. The Central now controls by stock ownership the Indiana Harbor Belt Railroad, hereinafter termed the Harbor Belt, which is located for the most part outside of Chicago and connects the Central main line with the River Road at Elsdon and with that road and the Junction at Forty-ninth and Oakley Streets and again with the latter line at Forty-ninth and Morgan Streets. The other eastern trunk lines, intervening in this proceeding and competing with the Central for line-haul traffic, connect with the terminal facilities afforded by the Junction and River Road either directly from their own rails or by means of other belt lines, namely, the Belt Railway of Chicago, controlled by a group of carriers, the Chicago & Western Indiana Railroad, likewise so controlled, and the Baltimore & Ohio Chicago Terminal Railway, owned by the Baltimore & Ohio Railroad. The Junction and River Road properties, the Elgin, Joliet & Eastern Railroad, and the Illinois & Northern Railroad comprise the only independently owned terminals in the Chicago switching district. The Junction and River Road handle traffic to and from all of the 23 trunk lines entering Chicago.

The nucleus of the present Junction system was constructed in 1865 by the stockyards interests, which oper-

ated the property up to 1887, all of the trunk lines entering [fol. 23] the yards for both inbound and outbound traffic. From 1887 to 1893 the lines were operated by a transfer association controlled by the carriers. The stockyards company resumed operation from 1893 to 1897, in which year the properties were leased to the Chicago & Indiana State Line Railroad Company for 50 years, and in 1898 the lines were merged with the Chicago, Hammond & Western Railroad Company under the corporate name of Chicago Junction Railway Company. In 1907 the Junction sold the Chicago, Hammond & Western properties to the Harbor Belt.

Besides serving the stockyards and Packingtown, the Junction performs terminal service for all the carriers in reaching the Central manufacturing district, which as an institution has been in existence for about 15 years and has 180 industries, producing a tonnage of over 100,000 carloads per year and 100,000 tons per year of less-than-carload freight. This district is in the geographical center of the city and is capable of accommodating not less than 500 additional industries and of producing more than twice the present annual tonnage of freight.

The movement of live stock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic. In the case of dead carload freight inbound, the line-haul carrier places its loads in the Junction yards at Ashland Avenue, where they are picked up by Junction engines and crews and moved to the point of unloading. Outbound carloads are picked up by the Junction crews at team and industry tracks and moved to its Forty-ninth Street classification yards, then taken out and classified for destination by the line-haul carreirs, each of which has in such yards an appropriate number of tracks designated to receive its traffic. For outbound less-than-carload shipments the Junction maintains a union freight station at Fifteenth Street and Western Avenue, where any number of packages can be drayed by a shipper and billed to destination on as many different trunk lines to any point in the [fol. 24] United States or Canada. Such shipments are collected by the Junction in a car or cars for each carrier and

delivered to the proper track in the classification yards as in the case of car load freight. A trap-car service is also maintained. Dressed meats from Packingtown are handled through the yards in like manner, each packer looking after the cleaning and icing of its own empty cars at a convenient point on the Junction rails. The Junction performs no function as to routing of a shipment, either carload or less-than-carload, and if through inadvertence a shipment is offered without routing it is held for instructions. Each carrier makes regular scheduled trips to the classification yards to leave and pick up its own line-haul freight, the number of trips per day depending upon the volume of business handled by the individual carrier. Thus the Junction organization performs purely a switching service as to those movements, the charges therefor constituting a part of the through rates published by the line-haul carriers. The Junction lines also serve an important purpose in providing facilities on a trackage basis for the interchange of traffic passing through the Chicago gateway. However, with the growth of the industrial switching business, the increased density of traffic has produced such a congestion as to make it desirable to perform certain services at points farther out on the belt lines. Earnings of the Junction in the past have not been such as to permit the expansion of its facilities to meet the growing requirements of the district served, and this is true as to interchange as well as switching and team-track facilities.

The position of the Central and the grounds upon which it relies for the support of its application may be summarized as follows:

The Central lines are vitally in need of additional down-town terminals in Chicago, which it can not now build up for itself because of the preemption of real estate and the high level of land values, rendering the cost of new construction prohibitive. A terminal property must necessarily be constructed before, and not after, an industrial development takes place. The Junction and River Road properties have a strategic location which can not now be [Vol. 25] duplicated, and could not be reproduced at any price. To bring under a common control these properties and the Harbor Belt would greatly promote the public interest by providing the necessary "balance" between the inner industrial movement afforded by the former and the transfer, interchange, and classification facilities avail-

able and potential on the rails of the latter. The junction properties are incapable of expansion so as to afford adequate facilities for interchange and classification, since the district in which they lie is highly developed and intensively used, whereas the Harbor Belt has or can acquire additional space for the building of yards. The inner and outer properties are therefore complementary and in no sense competitive, but can only be operated to the best advantage by bringing them under common control. This expansion at outlying points would permit the inner group to extend further its team-track facilities and enable a more expeditious use of the less-than-carload facilities of the stockyards group. The gain to shippers on the Junction would be found in the greater accessibility of the outer-belt facilities of the Harbor Belt and the expansion of inner facilities made possible by the removal of outer-belt facilities from the inner district. Inbound traffic, for example, would be brought first to outer classification yards on the Harbor Belt and there made up into trains for the 12 districts served by the inner lines. Other services now performed by the Junction in the congested area would be performed on the outer belt, to the great relief of the present Junction facilities.

The intervening carriers contend, in effect, and offer proofs tending to show, that the plan is contrary to public interest because the Junction and River Road lines are now neutral and open to all carriers and shippers on equal terms; that the plan would substitute monopoly of these facilities for the present neutrality of operation, to preserve which the transportation act, 1920, was designed, as evidenced by paragraph (4) of section 3 of the interstate commerce act, as amended; that the live-stock market requires open operation of the facilities serving the stockyards, and the shippers in the district must have competi- [fol. 26] tive service by neutral terminals; that the car supply for the district can not and will not be handled fairly by the Junction if controlled by the Central; that the latter will be able by means of such control to divert a large volume of competitive line-haul traffic to its own rails, thereby causing the intervening carriers to lose earnings to such an extent as to necessitate advanced rates; and that such carriers have an equity in the properties by reason of having contributed to the Junction's earnings. They

offer to combine with the Central in a joint control of the properties on the basis of their fair value.

The group of shippers intervening in opposition express the belief that they will not, under the proposed plan, continue to enjoy existing routing privileges or receive equal service from all trunk lines entering Chicago, but will be forced to route over the Central as a matter of self-protection.

The second group of intervening shippers are desirous of preserving intact the present organization of the Junction and the same impartial service which they now enjoy and desire that the Central bind itself to accept certain conditions designed to insure that result.

The Chicago Railway Terminal Commission fears that the project may prove deterrent to the adoption of the city's plan, not yet formulated, for the unification and coordination of all Chicago terminals, the establishment of universal freight stations, and other measures which may hereafter be adopted to relieve congestion in the downtown shipping district, and would prefer to have the Junction and River Road properties remain neutral pending the outcome of its investigations and the adoption, by legislation or otherwise, of a comprehensive policy.

As to values, the Central offered proofs tending to show that the present cost of reproduction of the River Road properties exceeds $3,000,000. Deducting the funded unmatured debt of $891,428.57 as of the date of the application, would leave an equity, it is asserted, of more than $2,000,000, represented by the capital stock of the par value of $500,000, for which the Central proposes to pay $750,000. [fol. 27] Further proofs tend to show a present cost of reproduction for the Junction properties, including the value of its leases, of considerably more than $33,000,000, represented in the proposed plan by the capitalization at 6 per cent of the $2,000,000 rental.

Estimates were introduced showing separately the cost of reproduction and cost less depreciation of road and equipment and the land values of the properties. Reproduction cost new was obtained by applying to the several quantities, as per inventory of the Bureau of Valuation, an average price for the year 1914, and applying thereto a multiple averaging 2.26 times the 1914 price, to obtain the cost new as of 1920. To these results were added normal percentages for engineering, general expenditures, and in-

terest during construction, and depreciation was applied to the whole in accordance with methods approved by the Bureau of Valuation. Adding structural going-concern value, materials and supplies, and working capital, a grand total of over $18,000,000 was obtained as the value of the Junction road and equipment, except land, and the corresponding figure for the River Road was, by the same methods, placed at over $2,000,000. An elaborate study of land value was presented and analyzed at some length by experts in Chicago real-estate values the conclusion being that the lands of the Junction are valued in excess of $23,000,000 and those of the River Road at over $1,500,000. Further opinion evidence was given as to the commercial or market value of the properties from the standpoint of the Central and the additional worth of such properties to it because of the uses to which they can be devoted in developing the Central's traffic, the contention being that the value of the properties to the Central is greatly in excess of that value which may be assigned to them for rate-making purposes.

It appears that the investment cost of the Junction property is impossible of accurate statement, because no proper accounts were set up until 1905, and since that time, it is stated, various important items have failed to find their way into the investment in road and equipment on the company's books. The investment reported by the Junction in [fol. 28] 1920 for the purposes of the proceedings in *Ex parte 74* (*Increased Rates, 1920*, 58 I. C. C., 220), was slightly in excess of $6,000,000. There is also evidence that the Junction officials as late as 1919 considered it proper to claim a value for rate-making purposes of something over $17,500,000. Our Bureau of Valuation has not yet completed its tentative report on the properties pursuant to section 19a of the act.

Under all the circumstances it is not feasible to make a definite finding of value in this proceeding which shall be taken and accepted as a final judgment in the matter, and the conclusion herein reached renders such a finding unnecessary.

On all the facts of record it is concluded that for the purpose of this proceeding only we may accept the position of the Central that the market value of the properties to the Central and its affiliated companies at this time is such as

to justify the payment of a rental based on something more than the value for capitalization or rate-making purposes. That is by no means saying, however, that its figures are to be accepted as the basis for permanent capitalization or for rate-making, or that the Central is to be permitted to capitalize the intangible values by paying, through the River Road, permanent fixed charges on the basis of the market value claimed. Since the values are not at this time capable of definite settlement, it follows that such part of the application as relates to the purchase of the capital stock or the physical properties of the Junction will not be granted herein, but will be reserved for future treatment at such time as the Central may desire to renew its application in that respect, following the final determination of values under section 19a of the act.

It remains to discuss the disposition which should be made of those portions of the application which relate to the acquisition of the capital stock of the River Road by the Central and the proposed lease to the former of the properties of the Junction.

There are grave objections to an unconditional approval of the plan under consideration. Much testimony was ad- [fol. 29] duced at the hearings, and divergent opinions were expressed, as to the relative merits of cooperative, singly controlled, and independently controlled terminals. That discussion need not be reproduced here. The policies and plans of the city with respect to the general terminal situation have not yet fully developed, and it is obviously impossible for any one to determine at this time the ultimate goal which ought to be attained. It is believed, however, that pending final determination of future policies, the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation. This can be best accomplished by bringing the present neutral Junction properties into closer relation with a trunk line like the Central. The Central's terminal facilities are relatively inadequate as compared with the competitor eastern trunk lines, but the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties. The stronger competition and the connection between the Junction properties and the Harbor Belt facilities which would thus be brought about, would not only insure to the shippers of the Junction the necessary

expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the city to another. It has been held that where such a transaction as the present one would clearly facilitate the movement of traffic through a highly congested district, the circumstances that other carriers would suffer a loss of revenue is not controlling. *People ex rel. New York Central R. R. Co.* v. *Public Service Commission*, 183 N. Y. S., 930.

There are in the record ample grounds for the belief that the Junction can not longer solve its problems without outside assistance. On the other hand, it is believed that the benefits pointed out by the Central can be made to accrue to the public by the consummation of the proposed plan. A prime factor in the situation is the circumstance that the [fol. 30] general policy on all terminals in Chicago is that of equal opportunity afforded to all connecting carriers irrespective of the ownership or control of a given terminal property by a single trunk line or by a group of trunk lines. Traffic is handled for all carriers in the same way and on the same terms, so that a shipper on terminals owned by a single carrier has the utmost freedom in routing via competing lines and apparently receives the same measure of service whether his shipment moves over the lines of the owning carrier or those of a competitor. Those shippers who appeared in opposition express the fear that they will not be accorded like treatment by the Central. The present management of the Central disclaimed any intention of making any changes in the method of handling competitive traffic or the general plan of operating the Junction properties, and those assurances may be taken at their face value, especially since the contrary policy would clearly be against the self-interest of the Central, in that it would thereby lose the good will of the shipper. There is, of course, every indication that the Central will be able to build up its own line-haul traffic as the result of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end.

But we are not prepared, in any event, to authorize the consummation of the plan without making assurance doubly sure by the imposition of certain conditions. Those conditions relate partly to the method of operation of the property and partly to the treatment of the transaction by the corporations participating therein. Among the number are those matters enumerated by the shippers who have asked an approval of the plan with the understanding that certain agreements already made by the Central will be adhered to. Other matters were suggested by the group of shippers who took a neutral attitude at the hearing, such matters being agreed to on the record by the applicant; and still others suggest themselves from the standpoint of an administrative body, as necessary in order to safeguard the public interest in the future. Stated concretely, the conditions are:

[fol. 31] 1. The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials.

2. The present neutrality of handling traffic inbound and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules.

3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central.

4. For the purpose of assessment of switching charges, the Junction and River Road shall continue to be treated as a single line to the same extent as at present, so that the carrying out of this plan will not in and of itself result in increasing the charge to any shipper for the service.

5. Subject to subsisting car-service regulations, cars made empty on the rails of the Junction and River Road

shall be available for outbound loading in the same manner and to the same extent as at present irrespective of routing.

6. Whenever additional cars are required for outbound loading, because of inadequacy of available car supply on the Junction and River Road rails at any given time, for any cause, orders for such additional cars shall be accepted from the shipper by the local Junction organization and by it promptly transmitted to the designated trunk line without discrimination, and all cars ordered by and delivered to the Junction shall be promptly moved to the shippers by the Junction without discrimination on account of proposed routing.

7. The Junction shall accept, handle, and deliver all cars inbound and outbound, loaded and empty, without dis- [fol. 32] crimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

8. The National Code of Demurrage Rules, as in effect from time to time, including the average agreement, shall be applied by the Junction and River Road to each industry served by either of them on all inbound and outbound cars irrespective of what carrier or carriers may be interested in the line haul.

9. Shippers served by the Junction and River Road shall be entitled to the same basis of switching charges as prevails in the Chicago switching district generally, and no attempt shall be made to establish any different basis of local or connecting-line switching charges that that which prevails in the Chicago switching district generally for the same or similar service under substantially similar conditions.

10. No change shall be sought in the present method of basing rates to and from the Chicago switching district as a single point upon which rates are now based without regard to the character of the movement in and out of such district.

11. Present trap-car arrangements for the transfer of less-than-carload freight at the Junction union station, at connecting-line freight stations, or at connecting points

reached by the Junction and River Road, shall be continued, but this condition shall not apply to routine changes in management and operation of trap-car service.

12. Continuance of present operating arrangement on the Junction properties shall include the maintenance of existing shipping and billing arangements at the Junction union freight station, so far as such arrangements are within the control of the Junction.

13. The Junction shall, if ordered by us, establish station facilities for the receipt of inbound less-than-carload freight at a point convenient and accessible to shippers wishing to make use of the same, to which freight may be delivered by all trunk-line carriers, without discrimination, and there distributed through the medium of the Junction's operating force.

[fol. 33] 14. Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified nor of the leasing to the latter of the properties of the Junction, shall be taken as establishing or tending to establish the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

15. The carrying out of the plan as authorized herein shall be taken to be without prejudice to the adoption of any plan or plans in the future by the city of Chicago, by us, or by any other public agency, for unified or coordinated terminals, and neither the Central, the River Road, nor the Junction shall urge the authority herein given or the situation resulting therefrom as a ground for opposition to such plan or plans of said city, our plans, or those of any other public agency.

16. Nothing contained in this authorization shall be taken as permitting the River Road and Junction properties to be considered as a part of a single system with that of the Central for any of the purposes of section 15a or section 20a of the act.

17. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them,

as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose.

Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.

An order will be issued in accordance with the foregoing.

DANIELS, *Commissioner*, concurring:

I concur in the result reached in this report. I am, however, of opinion that the report should recognize explicitly that the application should have been entertained under sec- [fol. 34] tion 1, paragraph 18, of the act; and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered.

I am authorized to state that Commissioner Campbell concurs in the views expressed above.

HALL, Commissioner, concur-ing in part:

If the powers of Congress are not adequate to deal with such a terminal situation as will result under the authorization here given, then they are not adequate to deal with the terminal situations which exist today in Chicago and many another city. The Pennsylvania, the Baltimore & Ohio, the North Western, for example, already have what the New York Central seeks in the way of lodgment, and, if it could not be dislodged, neither can they. If the powers of Congress are adequate, but those granted to this commission as its agency are not, additional grant will be needed to meet existing conditions quite as much as to meet those which would result from the proposed acquisition.

No solution of the Chicago terminal problem can be suggested which will not have to take into account the existing terminals of the 23 line-haul carriers serving that city as well as "independent" terminals like the Junction. Seven of the 23, competitors of the New York Central, are marshaled in opposition to what it seeks, but ready to join it in the acquisition and leave out the rest of the 23. The "neutrality" of the Junction will not be changed in respect of live stock, which constitutes about 35 per cent of its

traffic. That has long been moved by each line-haul carrier to and from the stock-yards over the Junction's rails and, as appears in the majority report, "all parties concede that that is the only practical method of handling that traffic." Acquisition by the New York Central may ultimately facilitate rather than impede solution by more nearly equalizing the respective contributions of the line-haul carriers to the looked-for "joint and cooperative terminal."

The facts warrant grant of authority without elaboration of conditions. Those imposed in the majority report seem to me vain, perhaps harmful, except Nos. 15 and 16, which [fol. 35] should suffice if any are needed. I refrain from discussing the points of law. They will doubtless be settled by competent authority when occasion arises.

MEYER, Commissioner, dissenting:

The Chicago Junction Railway and Chicago River & Indiana Railroad are now open terminals. According to the uncontradicted testimony the Junction is the best type of open terminal to be found anywhere in the United States. What the majority approves in this report may in the future restrict the use of and close these terminals to competitors on equal terms. That is why I can not concur in the report.

To be sure there are conditions in the order the intended purpose of which is to prevent the imposition of restrictive features in the use of the Junction Railway. I am not satisfied that those conditions can be adequately enforced, or that their enforcement, because of the necessary inflexibility when they are imposed as conditions, will not unduly hamper operations within the terminal.

The future of our railroads and the character of their service to the public depend largely upon the manner in which terminals will be used. For many years cases involving the use of terminal properties by competitive railroads have been before us. The one insuperable obstacle to the free use of terminals as reflected in these cases has been the insistence on the part of the owning carriers upon their technical legal rights, as a result of which much injustice has been done to individual shippers and the free development of industry hampered. Railroad companies seem to take the view that the public use of terminal properties is more limited than the use of their other properties

devoted to the public service. The familiar distinctions between and differences in treatment of competitive and noncompetitive traffic, short-hauling, and other considerations, have been invoked in order to defeat what in my judgment the commerce of this country clearly requires. My personal views regarding certain features of terminal situations are perhaps more fully reflected in our report in the [fol. 36] *Peoria & Pekin Union case*, 26 I. C. C., 226, than in some of the other terminal cases, and need not be restated here. Among the leading cases on this subject the following may be mentioned: *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I. C. C., 310, April 5, 1910; *Manufacturers Ry. Co.* v. *St. L., I. M. & S. Ry. Co.*, 21 I. C. C., 304, June 21, 1911; *Merchants & Manufacturers Asso.* v. *P. R. R.*, 23 I. C. C., 474, May 14, 1912; *Morris Iron Co.* v. *B. & O. R. R. Co.*, 26 I. C. C., 240, December 2, 1912; *St. Louis, Springfield & Peoria R. R.* v. *P. & P. U. Ry. Co.*, 26 I. C. C., 226. February 10, 1913; *Manufacturers Railway Co.* v. *St. L., I. M. & S. Ry. Co.*, 28 I. C. C., 93, June 21, 1913; *Buffalo, Rochester & Pittsburgh Ry.* v. *Pennsylvania Co.*, 29 I. C. C., 114, December 3, 1913; *Waverly Oil Works Co.* v. *P. R. R. Co.*, 28 I. C. C., 621, December 3, 1913; *Traffic Bureau of Nashville, Tenn.*, v. *L. & N. R. R. Co.*, 28 I. C. C., 538, December 9, 1913; *Manufacturers Railway Co.* v. *St. L., I. M. & S. Ry. Co.*, 32 I. C. C., 100, July 10, 1914; *City of Nashville* v. *L. & N. R. R. Co.*, 33 I. C. C., 76, February 1, 1915; *Louisville Board of Trade* v. *L. & N. R. R. Co.*, 40 I. C. C., 679, July 5, 1916; *Richmond Chamber of Commerce* v. *S. A. L. Ry.*, 44 I. C. C., 455, April 28, 1917; *The New York Harbor case*, 47 I. C. C., 643, December 17, 1917.

In the instant case the New York Central management has manifested a commendable departure from the old theories of restrictive and selfish use of railroad terminals by their owners, but although the applicants have agreed to conditions which, if made effective, would prevent in large part the ancient evils, there is and can be no adequate guaranty that through the imposition of switching charges, car supply, hours of interchange, and other means the commerce of Chicago tributary to the Junction may not some day be burdened by the assertion of individual rights of the owners acquired through this proceeding.

Before we can grant authority, under the transportation act, 1920, for this transaction it must appear affirmatively

that the public interest will be thereby promoted. It is not sufficient to show that no detrimental effects will follow. The sole advantages pointed out by the majority report [fol. 37] are the acquisition of additional downtown terminals in Chicago by the Central, the operation of the Junction and Harbor Belt as a unit with the corollary opportunity for expansion upon the outer belt, and the direct financial backing of a proprietary trunk line. The present terminals are open to the Central on the same terms as are afforded other roads. The prophesied advantages of unified operation are vague and indefinite, potential rather than actual. No complaint has been made as to present service or facilities, and there is evidence that the existing properties are not now used to full capacity. The remoteness of the hinted advantages which are the necessary basis for our approval is indicated by the terms of the order which eliminate from the transaction all prospect of present public gain by rigid maintenance of the existing times and places of interchange, and compulsory adherence to existing operating conditions.

The problem of terminals can not be solved in a year. It is a continuing one capable of solution only gradually by successive steps in the right direction in each locality. The present may prove to be a serious step in the wrong direction.

Commissioner Aitchison authorizes me to state his concurrence in this dissent.

EASTMAN, Commissioner, dissenting:

This proceeding has to do with a terminal railroad property in the city of Chicago serving the greatest market for live stock and packing-house products in the world and an industrial district already highly developed and capable of much expansion. For many years this property has been operated independently with financial profit to its owners and to the satisfaction of its trunk-line connections and of the shippers which it serves, and it is so operated at the present time.

It is now proposed, in effect, to transfer this property in perpetuity to one of its trunk-line connections, the New York Central, by means of a lease at a rental of $2,000,000 per year. We are asked to certify under paragraph (18) [fol. 38] of section 1 of the interstate commerce act that

public convenience and necessity require this transfer, and also to approve it under paragraph (2) of section 5. There is nothing in either the report or order of the majority that purports to be or is a certificate of public convenience and necessity and it must be assumed, therefore, that the order is based on paragraph (2) of section 5. In my judgment such a transfer as is contemplated is subject to paragraph 6 rather than paragraph (2) of section 5, and can not lawfully be approved by us until a plan of consolidation has been adopted under paragraph 5 of that section. However, in view of the conclusion which I have reached with respect to the merits of what is proposed, I shall not undertake to discuss questions of law at this time.

The rental of $2,000,000 per year is equivalent to 6 per cent upon $33,333,333. There is nothing of record to show that the actual investment in this terminal property has been much in excess of $6,000,000 and it clearly appears that by far the greater part of the investment has been derived from surplus earnings. The compensation to be paid for the property is thus very high, and in itself is reason for scrutinizing the transaction with great care. I am not in accord with the theory that the right of railroads or other public-utility companies to a return, through the medium of charges for the service which they furnish, upon unearned increment in real estate values or upon property representing the investment of surplus earnings is unqualified or unlimited. In this instance it appears that the earnings of the property have been almost wholly derived from trackage or switching charges which have been paid or absorbed by the trunk-line connections. It follows that they have not been a matter of concern to shippers and that their reasonableness has not been tested.

The suggestion was made on argument that if owners of a property have an opportunity to dispose of it on advantageous terms, it would be an invasion of their constitutional rights if we should refuse to permit the transaction to be consummated. The fallacy of the suggestion is obvious. Owners may have a constitutional right to sell if they can find a purchaser willing and able to [fol. 39] buy, but railroad corporations clearly have no constitutional right to buy. The question before us is not whether the owners of this terminal property may sell, but whether the New York Central may purchase. If public control had been exercised over similar purchases by the

New York, New Haven & Hartford, great economic waste might have been avoided. The suggestion that such control would have been an invasion of constitutional rights is not one that will appeal to the good sense of the community.

But I do not rest my dissent either upon questions of law or upon questions of price. A fundamental issue of policy is at stake. The proposed transaction is strongly urged by the New York Central and with equal energy condemned by the competing trunk lines. It is opposed by some of the interested shippers and favored, on paper at least, by more. To my mind, however, a most significant and important fact is the opposition of the Chicago Railway Terminal Commission, an official commission of the city of Chicago, created by ordinance and charged with the duty of studying the railway terminal situation, both passenger and freight, in that city.

We are here dealing with a problem which, in many of its aspects, is essentially local and for that reason, if for no other, the views of this Chicago Railway Terminal Commission would be entitled to great weight. They are the more persuasive, however, because they are the views of men of known reputation and ability who have made a study of the railway terminal situation, not only of Chicago, but of many of the more important cities of the United States, Canada, and Europe, and because they are views which in themselves have force because of their intrinsic merit.

The Chicago commission is impressed, as a result of its investigations, by the vast importance of the railway terminal problem in this country and the opportunities which its proper solution offers for the elimination of waste and the improvement of service. The following passages from its preliminary report indicate the trend and the basis of its views:

> With respect to terminal facilities and services, at [fol. 40] least, the advantages of competition seem negligible when compared with its disadvantages. * * *
>
> The complete application of the competitive system to railway freight terminals falls of its own weight. Each road can not secure and maintain terminal facilities covering the entire terminal area of such a city as Chicago. It can not secure, maintain, and operate adequate facilities in each and every section

or district within the metropolitan terminal area where important freight traffic is to be had. In many cases this is physically impracticable, and in many more cases it is financially impracticable. Nevertheless, the attempt is made—under existing methods—to cover as much as possible of the entire field by separate and competitive terminals, with the resultant complication of facilities, and a financial investment not justified by the revenue earned.

* * * In the terminal district of Chicago as a whole —and the same thing applies to other cities—the unnecessary complication of terminal facilities and operating costs is so extensive that it is appalling in its effect upon the railroads, the shippers and the public; and the future outlook along these lines is by many—in and out of railroad service—believed to be becoming worse and worse. The investments by railroads in unused or little used property to protect real or fancied competitive positions or interests, is also a source of great expense to the railroads and ultimately to the public—although not often fully realized as such. The interest on these investments is absorbed in the general interest charges on the entire property and is thus lost sight of as being an expense due to unproductive investments, nor is due allowance made for the natural accretion in the value of such property, which is often withheld from profitable use for considerable periods of time.

If the terminal situation were treated cooperatively instead of competitively, there would be an immediate simplification of the tangled network of tracks that now exist; the release for general commercial pur- [fol. 41] poses of much valuable property now held by railroads for present competitive purposes or prospective competitive needs; the reduction of operating costs in the terminal handling of freight and the increase of efficiency. To the public this would mean not only the improvement of the services to the shippers, but the reduction of the street congestion and the removal of existing obstacles to the growth and development of the city.

And by such reasoning it arrives at the following general conclusion:

> It is already clear, however, that the key to the solution of our railway terminal problem—with respect to freight as well as with respect to passengers—is to be found in the substitution of joint and cooperative terminals for separate and competitive terminals; this substitution to be brought about not by some sudden or drastic adoption and execution of a complete revolutionary plan covering the whole railway terminal situation, but by such steps as may be taken from time to time with due regard to financial and operating conditions. Certain important steps of this character undoubtedly can and should be taken at once or in the near future for the establishment of cooperative terminals and the readjustment of existing terminals to conform to correct principles of terminal development. *But the essential thing is that from now on no steps shall be taken in the opposite direction, thus creating unnecessary barriers to proper development in the future.*

In its opinion, the issue in this proceeding is "whether it will be more in the public interest to have the Chicago Junction Railway controlled by a single terminal agency controlling also the other terminal facilities within the Chicago terminal district, or to have the Chicago Junction Railway controlled by a single trunk line such as the New York Central Railroad. Or, rather, the issue is whether if the former be the better public policy the acquisition of the control of the Chicago Junction Rail- [fol. 42] way at this time by the New York Central Railroad will constitute an obstacle to the future adoption and development of the sounder public policy." The Chicago commission answers this latter question in the affirmative; but it asks and earnestly urges that for our own guidance and the guidance of the railroads and of the public we reach our own conclusions, before approving the transaction here proposed, as to the "principles of a sound and beneficial railway terminal policy to which future development should be made to conform," and decide this case accordingly.

In this connection it calls our attention to the following statement of former Chairman Clark of this commission

before the Committee on Interstate and Foreign Commerce of the House of Representatives in July, 1919:

> If I had my way I would begin this idea of merger and cooperation with the terminals, and I would provide, if I had my way and the direction of it, in every large commercial center for a terminal association or corporation which would be a separate entity. I would make it the terminal agency of all the roads that reach the place, operated as nearly as could be figured out at cost. Then the railroad serving that place would turn over the traffic destined to the place to this terminal agency and it would be delivered where the consignee wanted it delivered on any of the tracks. There would not be any question about closed or open terminals; there would be one terminal for all.
>
> *Mr. Rayburn:* You think that would be an efficient arrangement?
>
> *Mr. Clark:* I do, yes, sir.
>
> *Mr. Rayburn:* It would mean in all probability a saving?
>
> *Mr. Clark:* A great saving in expenditure, a great increase in efficiency and the elimination of endless friction.

It also directs our attention to the following passage from the report on consolidation of railways made to us by [fol. 43] William Z. Ripley and appearing in *Consolidation of Railroads*, 63 I. C. C., 455, at pages 483, 484:

> But whatever the cause for the existing situation, a practically universal demand of shippers is that they be able freely to exercise their routing rights by the provision of open terminals, both at the point of shipment and at destination. The right of route across country is impaired if the only possible delivery is at an inconvenient point. To put together railway lines on the map without having a constant regard to the possibility of free delivery or receipt at either end would indeed be futile. As to the particular means for accomplishment of this object—free and untrammeled utilization of terminals—there may well be difference of opinion. Conceivably, joint ownership and operation, as at St. Louis, may succeed in that environ-

ment, while reciprocal switching may satisfactorily answer the purpose as at Chicago. But, whatever the means adopted to this end, it is submitted that a *proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan.* No recommendation, therefore, as to particular terminal remedies is offered in this report. The subject technically is so involved, that it might well be made matter for a special investigation. Its bearing upon and relation to the subject of the division of through rates is as obvious at its intimate connection with consolidation. *The pending New York Central application to acquire the Chicago Junction Railway raises in itself almost all the possible aspects of terminal problems.* Consolidation can never be effectively brought about without the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in section 1, paragraph 15c, or by the adoption under a consolidation plan of permanent arrangements in all of the important centers. Possibly the assignment of terminal [fol. 44] properties might take place by means of leases based upon valuation by the Commission and at a rate fixed by the Commission as reasonable. This would permit the terminal companies to remain under the joint control of the several participating railroads, rather than that entirely independent terminal companies, actually owning these facilities, should be set up. The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike. [Italics mine.]

The majority dismiss the plea of the Chicago commission with the statement that it is "obviously impossible for any one to determine at this time the ultimate goal which ought to be attained." Pending final determination of future policies, they believe that "the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation," and think that this can best be accomplished "by bringing the present neutral Junction properties into closer relation with a trunk line like the

Central." Nevertheless they are apparently sufficiently in doubt as to the good to be attained from this "continuance" of competition so that they feel it necessary to surround the transaction by 17 more or less complicated conditions which can only be enforced, if at all, by constant surveillance and policing.

I have little sympathy with this plan of conditions. Either the transaction should be approved, or it should be disapproved. If it is not so meritorious that it will yield good results in the natural course of events, it never can be made to do so by all manner of paper commandments. But, aside from this, I submit that what the majority are proposing is in no sense a "continuance of the competitive terminal situation," but rather an enlargement and extension of this situation. What has been neutral will cease to be neutral, and to that extent it will be more difficult to retrace our steps if we finally discover that "the ultimate goal which ought to be attained" is not competition but [fol. 45] cooperation. And the situation is in this respect the more serious in that we are here dealing with a terminal property serving exclusively the greatest market for live stock and packing-house products in the world. The transfer of such a property, now neutral, to the possession of a single trunk line is most assuredly no small or insignificant departure from a policy of terminal cooperation and coordination.

For my own part I do not believe that it is at present impossible to determine the "ultimate goal to be attained." If it is impossible, we can at least follow the best light that we now have, and certainly we ought not to delude ourselves into believing that we are maintaining the *status quo* when we are in fact countenancing a very radical and important step towards one possible ultimate goal and away from another. Moreover, I have no hesitation in expressing a conviction, based on such knowledge as I now have, that former Chairman Clark and the Chicago Railway Terminal Commission are right in believing that the ultimate goal is the "substitution of joint and cooperative terminals for separate and competitive terminals," and that the attainment of that goal would make possible far-reaching economies and improvements in service.

I agree also with the Chicago commission that the public benefits which the New York Central claims will flow from

the acquisition of the Junction property are either vague, uncertain, and illusory or quite possible of attainment without such acquisition. The record does not support the conclusion that there will be any public loss if the transaction is disapproved. In my opinion it will be an obstacle to the future proper solution of the Chicago terminal situation, will embarrass our determination of a plan of consolidation under section 5 of the interstate commerce act, will be contrary to the public interest, and ought not to be approved.

Commissioner Cox also dissents.

[fol. 46] ORDER

A hearing and investigation of the matters and things involved in this proceeding having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.

It is further ordered, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized: *Provided*, That the right to prescribe the terms, methods, and character of securities, if any, which the New York Central Railroad Company may employ to effectuate the purchase of the capital stock of the Chicago River & Indiana Railroad Company be, and it is hereby, reserved to the Interstate Commerce Commission: *And provided further*, That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive.

And it is further ordered, That said application, so far as it seeks authority to purchase the capital stock or the physical property of the Chicago Junction Railway Company, be, and the same is hereby, denied without prejudice to future proceedings.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 47] EXHIBIT "B" TO COMPLAINT

Interstate Commerce Commission

Finance Docket No. 1165

Chicago Junction Case

Submitted June 1, 1928. Decided December 3, 1928

Upon further hearing, condition numbered 14 in original report in this proceeding, 71 I. C. C. 631, 641, modified.

Robert J. Cary for Chicago River & Indiana Railroad Company and New York Central Railroad Company.

Mark W. Potter for Chicago Junction Railway Company.

Ernest S. Ballard, James Dale Thom, and Butler, Lamb, Foster & Pope for Harris Brothers Company, intervener.

Luther M. Walter for Pullman Couch Company, intervener.

Report of the Commission on Further Hearing

By the COMMISSION:

In our original report and order in this proceeding, issued May 16, 1922, 71 I. C. C. 631, we authorized the Chicago River & Indiana Railroad Company to lease the Chicago Junction Railway, and also authorized the New York Central Railroad Company to acquire control of the Chicago River & Indiana Railroad Company by purchase of its capital stock; both authorizations being subject to certain conditions stated in the report. In the same proceeding, the application of the New York Central Railroad Company for authority to purchase the capital stock or physical properties of the Chicago Junction Railway Company was

[fol. 48] denied without prejudice to future proceedings. These companies will be referred to hereinafter as the River Road, the Junction, and the Central.

The railway properties of the River Road and the Junction together form very important terminal facilities in the Chicago switching district, and acquisition of control of these properties by the Central was strongly opposed by other railway companies reaching Chicago and desiring the service of these facilities, and by various shipping interests, the ground of opposition being, in substance, that acquisition by a single trunk line serving the Chicago district would endanger the impartial service of the terminal. To avoid such a result, and otherwise to protect the public interest, the authorizations were made subject to 17 conditions, which were set forth in our report. Among these conditions was one numbered 14, reading as follows:

> Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified nor of the leasing to the latter of the properties of the Junction, shall be taken as establishing or tending to establish the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

The amount of rental reserved under the lease, as executed pursuant to our order, was $2,000,000 per year, which was arrived at by computing 6 per cent upon an assumed value of $33,333,333.

Condition No. 17, of the original report, provided that any party or person having an interest in the subject matter of the report might at any subsequent time make application for such modification of the conditions, or any of them, as might be required in the public interest, and jurisdiction was retained to reopen the proceeding for such purpose. Referring to this provision, as well as to the provisions of the act, the Central, the Junction, and the River Road petitioned that the former report and order be modified by striking therefrom condition No. 14, above quoted, [fol. 49] and that we make a finding that the annual rental reserved under the terms of the indenture of lease of May 19, 1922, made pursuant to the report and order, to be paid

by the River Road to the Junction, is just and reasonable. Petitioners allege that such action is necessary in order to remove an ambiguity, in that a failure to find the rental just and reasonable was inconsistent with the apparent intent of the order, which was to authorize the execution of the lease upon consideration of the rental proposed, subject to conditions applicable thereto. Hearing was set upon this petition for the sole purpose, as stated in the order, of receiving evidence "as to whether the report and order issued herein on May 16, 1922, should be amended by striking therefrom condition No. 14, and by inserting a finding that the annual rental reserved under the terms of the indenture of lease of May 19, 1922, made pursuant to the report and order, to be paid by the Chicago River & Indiana Railroad Company to the Chicago Junction Railway Company, is just and reasonable." Hearing was held on December 19, 1927, at which the petitioners submitted evidence of the value of the properties in question and their earnings since the effective date of the lease, and referred to portions of the record in the original hearing bearing upon the value of the same properties.

At the time of the original hearing we had not completed our valuation of the properties under section 19a of the act, but evidence was then submitted tending to show a cost of reproduction of the Junction properties at the time of the hearing, including the value of its leases, of considerably more than $33,000,000. At the hearing on December 19, 1927, there was placed in evidence our report of the tentative valuation of the property of the Junction as of June 30, 1919, showing a total value of property used by that company on that date of $31,667,626. Petitioners insist that the report does not give sufficient recognition to intangible values and that for this and other reasons the total value at the time of the further hearing was considerably in excess of $33,000,000. Of the total value thus found, about $23,800,000 was made up of land values. In further evidence of the propriety of the amount of rental reserved, [fol. 50] there has been placed in the record a statement of the earnings of the Junction properties since the effective date of the lease showing that after the payment of rental at the rate of $2,000,000 per year the net income of the River Road attributable to the operations of the Junction for the period May 19 to December 31, 1922, was $854,482; for the year 1923, $847,161; for the year 1924, $479,466; for the

year 1925, $164,737; for the year 1926, $551,768; and for the 10 months ending October 31, 1927, $395,381.

While the record upon the original hearing was somewhat indefinite on the question of value of the leased property, it was sufficient to support a finding that the rental consideration was just and reasonable to the extent necessary for a favorable decision upon the application, and the report and order should not be otherwise construed. The propriety of such a finding is supported by the additional facts now in evidence. The original report will be sufficiently amended by striking therefrom the concluding portion of condition No. 14, reading "nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable." This amendment will be made.

At the further hearing a copy of the lease executed May 19, 1922, three days after the issuance of our original report, was placed in the record. Although it refers to our authorization and purports to be based thereon, it nevertheless contains a provision giving the Central, its successors and assigns, the option to purchase, subject to our approval, at a stated price, all of the leased properties at any time during the term of the lease or any extension thereof.[1]

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[1] Article XII of the lease reads as follows:

"*Grant to the Central Company of an Option to Purchase Demised Premises:* The Junction Company and the Yard Company hereby severally covenant and agree that subject to the approval pursuant to law of the Interstate Commerce Commission or of such other public authority, State or Federal, as may have jurisdiction in the premises, the Central Company, its successors and assigns, shall, at its or their option, to be exercised at any time during the term of this lease or of any extension thereof, have the right to purchase and acquire all of the right, title and interest of the Junction Company and the Yard Company in the properties and appurtenances, real and personal by this indenture demised and leased or assigned, or transferred (including all the premises and properties leased by the Yard Company to the Junction Company under the said lease dated December 1, 1913, and leases supplemental thereto mentioned in item (2) of Section 1 of Article 1 hereof, but not

[fol. 51] Harris Brothers Company, of Chicago, intervened at the further hearing for the purpose of securing an appropriate condition or other provision to prevent any implication that the granting of the relief prayed for by the petitioners may be construed as approving or sanctioning the option which was denied without prejudice in our original report. The Pullman Couch Company also intervened at the oral argument, in effect joining in the request of Harris Brothers Company. The carriers take the position that the option, as contained in the existing lease, is innocuous for the reason that it could not be exercised without coming to us for further authority. They nevertheless plead for the retention of the provision in order that it may be available for possible future action. They distinguish between the granting of an option and its exercise, and point out that the original report and order simply denied without prejudice the application "for authority to purchase the capital stock or the physical property" of [fol. 52] the Junction. Such construction is not warranted. The order of May 16, 1922, must be construed as applying to the request for approval of the option sought in that proceeding. The lease should therefore be reformed to the extent necessary to bring it into conformity with our authorization.

An appropriate amendatory order will be issued.

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including the interests of the Yard Company in any properties held by the Junction Company under other leases from the Yard Company) intending hereby to grant to the Central Company, its successors and assigns, an option to purchase and acquire for the price and upon the terms and conditions hereinafter specified all the right, title and reversionary interest of the Junction Company in all of the premises, properties and other interests hereby demised and all the right, title and reversionary interest of the Yard Company in and to the premises and property demised by said lease of December 1, 1913, and/or any and all supplements thereto. The price therefor shall be the sum of thirty-three million, three hundred and thirty-three thousand, three hundred and thirty-three dollars ($33,333,333) payable in cash or in such securities as the Junction Company, the Yard Company and the Central Company shall agree upon. The Central Company shall give to each the Junction Company and the Yard Company sixty (60) days'

AITCHISON, Commissioner, concurring:

In the original report herein, 71 I. C. C. 631, 644, I am noted as dissenting as to the arrangement proposed being in the public interest. That is the initial question to be determined in passing upon applications of this character. It is not before us now, and is foreclosed by the original decision, and the recent refusal of the commission to reopen the proceeding for a consideration of that question. Assuming that question to be determined in favor of the application, the remaining question is as to whether the [fol. 53] terms and conditions of the proposed lease are reasonable and just. Upon that assumption, I can concur in the determination that the lease modified as indicated in the original report and the foregoing report on further hearing, meets the requirements of the statute.

EASTMAN, Commissioner, dissenting:

Without going into the details, which are complicated, the sum and substance of this matter is that for the possession and use of the properties of the Chicago Junction a rental is being paid which, after providing for the rentals which the Chicago Junction itself pays on a large part of the properties, nets that company a huge yearly profit. In justification of this rental reliance is placed upon earn-

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notice in writing of its intention to exercise the option herein provided for, and the Junction Company and the Yard Company hereby severally covenant and agree that upon receipt of said notice and the approval of the public authorities whose approval is required by law each will, at the termination of said sixty (60) days and upon receipt by it of its portion of said purchase price, as hereinafter stipulated, execute and deliver to the Central Company or to its nominee such deeds and other instruments as will effectively convey to the Central Company or to its nominee all their respective right, title and interest in and to the premises, properties and interests above described to be so purchased, such deeds or other instruments to contain full covenants of general warranty with respect to any properties now owned by said companies respectively in fee simple, and covenants of special warranty as to all other properties. The Junction Company and the Yard Company further severally covenant that the properties to be so conveyed shall be free

ings, especially those since the lease became effective, and upon our tentative valuation of the properties, which in part are owned by the Chicago Junction but for the most part are leased by it, largely in perpetuity, at rentals which in comparison with the rental here approved are very low. The evidence as to earnings is of little consequence, for they have been almost wholly derived from trackage or switching charges which have been paid or absorbed by the trunkline connections. It follows that they have not been a matter of concern to shippers, and the competition of the trunk lines for the traffic prevents complaint upon their part. Hence the reasonableness of these charges has not been put to the test. So far as the New York Central is concerned, being the ultimate lessee of the properties, it is also the ultimate beneficiary if earnings are excessive.

The valuation evidence is of more consequence, but analysis shows that the reason why the tentative valuation is high enough to be used in justification of the amount of the rental is because it is based largely on estimates of land values which have increased very greatly since the land was originally purchased or leased. This raises a question of vital public importance. The provision of public highways for rail transportation is a function of the

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and clear of all liens, encumbrances and other liabilities except such as are specified in Exhibit "C" hereto attached, or shall hereafter be created or placed upon the same by the River Company or the Central Company, or with the consent in writing of either of these last named parties (the Central Company to take the same subject thereto and to this lease), and if at the time of the conveyance of said properties any liens, encumbrances or other obligations shall exist upon the same except as specified above, or if for any cause either the Junction Company or the Yard Company shall be unable to convey any as aforesaid portion of said properties or of improvements thereon subject to the option of purchase in this Article XII provided for, (where such inability is not caused by limitation in an instrument or agreement mentioned in said Exhibit C), the amount of any such lien, encumbrance or other obligation or the value of any property or improvement which cannot be so conveyed shall be deducted from the purchase price therein provided for.

State, according to numerous decisions of the Supreme Court. If this public work is to be performed by private companies, they should be fairly compensated. It is right [fol. 54] that they should be protected in every way in an opportunity to earn upon the capital which they devote to the enterprise a return which will amply encourage the further investment of funds which the work in general continually requires. This is a just and economically sound policy which ought to be scrupulously followed. But it is not right nor just nor economically sound that these private companies should be given, in addition, an opportunity to earn a return upon a further amount which does not represent funds which they have invested but which represents increment in the estimated value of property, particularly lands, which they own or use.

The result of the latter policy is that the community gains no benefit whatever from the timely devotion of property to public highway use, but must always pay as if the property were being acquired anew each year in the most un-

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"The Central Company shall by covenants in such instruments of conveyance contained assume or agree to perform all obligations imposed on either the Yard Company or the Junction Company in respect of the properties so to be conveyed thereby by any of the instruments or items enumerated in said Exhibit 'C' or hereafter incurred pursuant to the provisions of this agreement by either of said corporations in connection with the upkeep or operation of said properties or imposed upon either of said corporations by any ordinance, regulation or requirement, present or future, affecting or relating to said properties, of the City of Chicago, or other public body, or by any law of the United States or of the State of Illinois.

"The Central Company shall pay of said purchase price twenty-two million, nine hundred and eighty-seven thousand, five hundred and sixteen dollars ($22,987,516) to the Junction Company and ten million, three hundred and forty-five thousand, eight hundred and seventeen dollars ($10,345,817) to the Yard Company.

"The Junction Company and the Yard Company hereby further covenant and agree that each will take such corporate action as may be necessary and appropriate to make effective the conveyances and transfers in this Article provided for."

timely and improvident fashion. If the State had itself acquired the property originally, a return upon such an increment in values would not only never be sought but in due time the original debt would be retired and cease to be a burden. Such gradual retirement of debt is sound and conservative public finance, but under the prevailing policy when a private railroad company undertakes the same work the corresponding burden upon the public never grows less but on the contrary continually increases and with menacing rapidity where terminal lands in great cities are involved. The notion that a policy which produces such results is right, just, and economically sound is not the product of clear thinking but rests upon assumed property rights which in truth have no solid foundation. Such a policy will never be corrected unless it is analyzed and dissected and its inevitable consequences made plain. In my judgment that is proper and very appropriate work for a public body like this commission. An excellent way to begin this work would be to find that the terms and conditions of the lease here involved are unjust, unreasonable, and contrary to the public interest.

I am authorized to say that Commissioner McManamy joins in this dissent.

Chairman Campbell dissents.

[fol. 55] ORDER

Entered December 3, 1928

Further hearing and investigation of the matters and things involved in this proceeding having been had, and this commission having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That condition numbered 14, as contained in the original report in this proceeding, 71 I. C. C. 631, 641, be, and it is hereby amended by striking therefrom the words "nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable."

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 56] EXHIBIT "C" TO COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity

No. 3427

THE BALTIMORE & OHIO RAILROAD COMPANY, et al.

vs.

UNITED STATES OF AMERICA, et al.

The plaintiffs in this cause having heretofore, upon due notice to all parties, moved for an order dismissing their bill, and the court having considered the motion,

IT IS NOW ORDERED that said bill be and it is hereby dismissed without prejudice to the rights of the defendants, the Chicago Junction Railways and Union Stock Yards Company and the Chicago Junction Railway Company, under their answers and counterclaims filed herein.

And the application of the Pullman Couch Company, for leave to intervene and be made party plaintiff herein, having been withdrawn, and it having been shown to the court that on December 3, 1928, the Interstate Commerce Commission, upon a further hearing, entered a supplemental decision and order with reference to the subject matter involved in this suit; and the transcript of the evidence before the Commission upon the several hearings before it, together with the supplemental decision and order of the Commission, having been submitted to the court herein, [fol. 57-58] and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties.

Enter: George T. Page, Circuit Judge, Carpenter, Judge, Wilkerson, Dist. Judge.

ok. Horace Kent Tenney.
ok. Sidney C. Murray.
ok. R. W. Richards.

[fol. 59] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

COMPLAINT OF INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed February 21, 1946

The Interstate Commerce Commission for its Complaint of Intervention states:

1. The defendants in this cause are common carriers by railroad engaged in interstate commerce and are subject to the provisions of the Act to Regulate Commerce as amended, 49 U. S. Code 1, et seq.

2. On May 16, 1922, in a proceeding entitled "Finance Docket No. 1165, Application of the New York Central Railroad Company for Approval of Purchase of Stock, Lease of Property, and Option to Purchase Stock of Property," the Interstate Commerce Commission made and entered an order authorizing and approving the acquisition by the New York Central Railroad Company, hereinafter termed the "Central," of control of the Chicago River and Indiana Railroad Company, hereinafter termed the "River Road," by purchase of its capital stock, and the acquisition by the River Road of the control, by lease, of the Chicago Junction Railway Company, hereinafter termed the "Junction."

[fol. 60] 3. Said approval and authorization was made and given subject to the observance of certain specified conditions referred to in said order and enumerated and set forth in the report of the Commission in the proceeding. Said report and order are contained in Exhibit A to the plaintiffs' complaint filed in this cause.

4. Condition 3 of the conditions referred to in paragraph 3 hereof is as follows:

> "'The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central.'"

5. By authority of said order the Central acquired control of the River Road by purchase of its capital stock and the River Road acquired control by lease of the Junction.

6. Long prior to the order of the Commission in Finance Docket No. 1165, under the operating arrangements in effect between plaintiffs respectively and the Junction and the River Road, each line-haul carrier, including plaintiffs herein, moved empty livestock cars (other than livestock cars used for the loading of hogs and sheep) to places of loading in the Union Stock Yards on the rails of the Junction with their own power and crews and, after they had been loaded by shippers, moved said cars from said places of loading with their own power and crews over the rails of the Junction, via its connections with their respective lines, to and over said lines as consigned and routed by the shippers. For such privilege a charge of $1.00 per car, loaded and empty, was exacted from plaintiffs. Such operating arrangements continued after the Commission's order and until February 1, 1946.

7. Beginning February 1, 1946, a change was made in the operating arrangements in respect of movements of stock [fol. 61] cars as set forth in paragraph 6 hereof. Instead of allowing each line-haul carrier, including plaintiffs herein, to move empty and loaded stock cars with their own power and crews to and from the places of loading in said Union Stock Yards, the defendants, the Junction and the River Road, lessee, by their power and crews perform all the switching incident to the outbound movement of livestock, and the crews of the line-haul carriers pick up such cars at points of interchange. For such switching service a charge of $12.96 per outbound loaded car is exacted from plaintiffs.

8. The said change in operations as set forth in paragraph 7, constituted and was discontinuance in part of "the present traffic and operating relationships existing between the Junction and River Road" and the plaintiffs herein, and was and is in violation of the order of the Interstate Commerce Commission of May 16, 1922, issued in said Finance Docket No. 1165.

9. The Commission states on information and belief, that certain trackage rights may have been acquired by plaintiffs or some of them, either over the line of railroad of the River Road or over the line of the Junction or over both, by reason of written agreements, or otherwise. That the change in the operation agreements has brought about

abandonment wholly or in part of such trackage use and operation. That such abandonment is unlawful unless authorized by the Commission. No such authorization has been sought or given.

10. The Commission is by statute (Sec. 5(8) of the Interstate Commerce Act, 49 U. S. Code 5(8)) authorized to seek, and the District Courts of the United States are given jurisdiction to afford, injunctive or mandatory relief to restrain violation of or compel obedience to an order issued under Section 5.

[fol. 62] Wherefore, this Intervener prays:

1. That a preliminary injunction issue restraining and enjoining the defendants and each of them, their respective officers, agents, representatives, servants, employees and successors from

(a) failing and neglecting to obey said order of the Commission of May 16, 1922;

(b) violating condition 3 of said order of the Commission of May 16, 1922;

(c) interfering with, abrogating, or failing or refusing to accord, such trackage rights over the line of the Chicago River and Indiana Railroad and of the Chicago Junction Railway or either of them, which the plaintiffs or any of them may be found to be entitled to.

2. That upon final hearing said injunction may be made permanent.

3. That the Court grant such other and further relief as may appear just and equitable in the premises.

Interstate Commerce Commission, by H. L. Underwood, Its Attorney, 3341 Interstate Commerce Commission, Washington, D. C.

[fols. 63-64] *Duly sworn to by H. L. Underwood. Jurat omitted in printing.*

[fol. 65] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION OF FACTS—Filed February 25, 1946

It is hereby stipulated by and between The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, plaintiffs; Interstate Commerce Commission, intervening plaintiff; and The Chicago River and Indiana Railroad Company, Chicago Junction Railway Company, and The New York Central Railroad Company, defendants, by their respective attorneys, that the following stipulation of facts shall be considered as evidence in this cause on the hearing of the motions for preliminary injunction of plaintiffs and intervening plaintiff, and that the facts herein stated shall be taken as true and shall be binding upon the parties hereto, except that objections may be made on brief as to relevancy and materiality and shall have the same force and effect as if made when the evidence was offered;

[fol. 66] 1. Plaintiffs are corporations organized and existing by virtue of the laws of the following states respectively: The Baltimore and Ohio Railroad Company, Maryland; The Chesapeake and Ohio Railway Company, Virginia; Erie Railroad Company, New York; Grand Trunk Western Railroad Company, Michigan and Indiana; The New York, Chicago and St. Louis Railroad Company, New York, Pennsylvania, Ohio, Indiana and Illinois; The Pennsylvania Railroad Company, Pennsylvania; Pere Marquette Railway Company, Michigan; Wabash Railroad Company, Ohio.

2. Plaintiffs respectively operate certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and are common carriers engaged in the transportation of property (including livestock) by railroad between Chicago, Illinois, and points in other states of the United States.

3. Intervening plaintiff is a public body organized and existing under Sections 11 and 24 of Part I of the Interstate Commerce Act (Tit. 49, U. S. Code, Secs. 11 and 18) and was duly permitted to intervene in this case as a party plaintiff by order of this Court entered February 21, 1946.

4. Defendant, The Chicago River and Indiana Railroad Company (herein called the River Road), is a corporation organized and existing by virtue of the laws of the State of Illinois, and operates a line of railroad serving the Union Stock Yards, Chicago, Illinois, and connecting at Chicago, Illinois, with plaintiffs' respective lines of railroad and with the line of railroad of The New York Central Railroad Company, one of the defendants herein, referred to in paragraph 6 hereof, and is a common carrier engaged in the transportation of property (including livestock) by railroad (in connection with various connecting common carriers by railroad, including plaintiffs and defendant, The New York Central Railroad Company, as their various [fol. 67] routes may run) between said Union Stock Yards, Chicago, Illinois, and points in other states of the United States.

5. Defendant, Chicago Junction Railway Company (herein called the Junction), is a corporation organized and existing by virtue of the laws of the State of Illinois, and owns certain lines of railroad and leases certain other lines of railroad serving said Union Stock Yards, which lines (owned and leased) are leased to and operated by the River Road under lease dated May 19, 1922, hereinafter mentioned.

6. Defendant, The New York Central Railroad Company (herein called the Central), is a corporation organized and existing by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and operates certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and is a common carrier engaged in the transportation of property (including livestock) by railroad between such points.

7. On May 16, 1922, and for many years prior thereto, plaintiffs or their predecessors in interest moved empty livestock cars used for the loading of livestock other than hogs and sheep (herein called stock cars) with their own

power and crews from their respective lines, via their respective connections with the line now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of loading with their own power and crews over said line, via the connections of said line with their respective lines, and thence to destination as consigned and routed by the shippers. On and immediately prior to May 16, 1922, a charge of $1.00 per car, loaded and empty, was paid by plaintiffs respectively or their predecessors in interest for the privilege of so moving said cars.

8. On December 28, 1920, the Central filed with the Interstate Commerce Commission (herein called the Commis- [fol. 68] sion) its application for approval, *inter alia*, of the following proposed transactions:

> "(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;
>
> "(b) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity;"

the proceeding on which application was known and described on the docket of the Commission as *Chicago Junction Case*, Finance Docket No. 1165. On May 16, 1922, the Commission made and entered a report and order in said proceeding, which are reported in 71 I. C. C. at pages 631-650, a copy of which, marked Exhibit A, is attached to the original complaint herein and by this reference made a part hereof.

By said report and order the Commission approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows (71 I. C. C. p. 650):

> "That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative,

to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive."

The conditions so referred to included the following condition (71 I. C. C. p. 639):

[fol. 69] "3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central."

After having enumerated the foregoing conditions in said report, the Commission made the following finding (71 I.C.C. p. 641):

"Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

Said report and order were duly served on defendants and each of them on May 18, 1922.

9. On May 19, 1922, pursuant to the approval and authorization granted in said order of May 16, 1922, the Central acquired control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000, and the River Road acquired control of the property (owned and leased) of the Junction by lease. Said control of the River Road by the Central and of the property of the Junction by the River Road has continued from that date down to the present time and is still in effect. From May 19, 1922, to and including January 31, 1946, the River Road continued in effect the operating arrangements described in paragraph 7 hereof.

10. On December 3, 1928, the Commission made and entered its report on further hearing and order in said *Chicago Junction Case*, which report and order are reported in 150 I.C.C. at pages 32-38, a copy of which, marked Exhibit B, is attached to the original complaint herein and by this reference made a part hereof. Said report on fur-

ther hearing and order of the Commission amended condition 14 of its report and order of May 16, 1922. Said report on further hearing and order were duly served on [fol. 70] defendants and each of them on the 14th day of December, 1928. As so amended said report and order of May 16, 1922, are still in full force and effect.

11. On January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain proceeding then pending in said Court entitled *The Baltimore & Ohio Railroad Company et al.* v. *United States of America et al.*, in equity No. 3427, to which proceeding all of the plaintiffs herein or their respective predecessors in interest and all of the defendants herein were parties, entered a final decree, copy of which, marked Exhibit C, is attached to the original complaint herein and by this reference made a part hereof. By said decree said Court found and decreed with respect to the Commission's said order of May 16, 1922, as follows:

> "and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties."

12. On or about January 25, 1946, J. L. McKee, vice-president of the Central and of the River Road, announced that on and after February 1, 1946, line haul carriers (including plaintiffs and the Central) would not be permitted to continue to move stock cars as set forth in paragraph 7 hereof, and that, when such cars were to be placed for loading on the line of the River Road in said Union Stock Yards, they would be moved by the power and crews of the River Road from points of interchange with such carriers respectively on the line of the River Road to such places of loading, and after they had been loaded at such places of loading, would be moved thence by the power and crews of the River Road to points of interchange with such carriers respectively on the line of the River Road, and that at such points they would be delivered by the River [fol. 71] Road to such carriers respectively, and that, upon the taking effect on February 1, 1946, of the aforesaid change, instead of the charge of $1.00 per car, loaded and empty, theretofore paid by such carriers respectively to

the River Road and accepted by it in full payment for the privilege of moving such cars as described in paragraph 7 hereof, there would be due and owing from such carriers respectively to the River Road, pursuant to Chicago Switching Committee Division Sheet No. 12-J, issued by R. G. Raasch, Agent, effective June 1, 1945, $12.96 per outbound loaded car as a division of the joint through rate on carload shipments of livestock other than hogs and sheep from said Union Stock Yards to destinations reached via the respective lines of such carriers.

13. After the announcement made, as stated in paragraph 12 hereof, on or about January 25, 1946, plaintiffs and each of them made written protest to the Central and the River Road objecting to the change referred to in paragraph 12 hereof, and demanding that the traffic and operating relationships theretofore in effect be continued.

14. Pursuant to the announcement referred to in paragraph 12 hereof, on and at all times since February 1, 1946, the River Road has caused its employees to fail and refuse and the employees of the River Road have failed and refused to throw the switches necessary to permit the power and crews of plaintiffs respectively to place stock cars at loading places on the line of the River Road in said Union Stock Yards and to move said cars from said loading places, and have required plaintiffs' respective crews to place empty stock cars in an interchange yard on the line of the River Road which yard is used by plaintiffs respectively and the River Road for the interchange of cars, and have required plaintiffs respectively to receive such cars, after the same had been loaded at other points on the line of the River Road, and said cars have been moved by the power and crews of the River Road from said interchange yard to points of loading on the line of the River Road in [fol. 72] said Union Stock Yards and, after having been there loaded, back to other points on the line of the River Road, where they have been and are delivered by the River Road to plaintiffs respectively. At all times on and since February 1, 1946, the River Road has failed and refused and still continues to fail and refuse to permit plaintiffs to move stock cars as set forth in paragraph 7 hereof.

15. The Brotherhood of Railroad Trainmen, bargaining agent under the Railway Labor Act for River Road trainmen, having failed to settle certain disputes—among others

a demand, claimed by said Brotherhood to be based upon a contract with the River Road, that River Road trainmen be given the work of moving and switching stock cars described in paragraph 12 hereof—notified the River Road, under authority of an almost unanimous strike vote of said trainmen, that unless said disputes were settled before 10:30 P. M., January 23, 1946, River Road trainmen would go out on a strike at that hour. Under continued threat of such a strike the River Road shortly before the hour set for said strike made an agreement with said Brotherhood which, among other things, provided that said work of moving and switching cars be given to River Road trainmen. J. L. McKee, Vice President of the River Road and of the Central, participated in the negotiations with the Brotherhood of Railroad Trainmen and signed the foregoing agreement as Vice President of said railroads.

16. Prior to May 19, 1922, the Junction operated a small but important switching road in and around the Union Stock Yards, at Chicago, in conjunction with a connecting switching line owned and operated by the River Road.

17. By the aforesaid lease dated May 19, 1922, the Junction demised and leased all of its lines of railroad and other railroad properties (including its locomotives and cars) to the River Road at a rental of $2,000,000 per annum for a term of ninety-nine years, and thereafter at the election of the River Road in perpetuity.

[fol. 73] 18. Said lease, so authorized by the Interstate Commerce Commission, provided:

> "The River Company (i.e. River Road) shall have the right to conduct, operate and manage, and will so do at its own sole cost and expense, the premises and properties by this instrument demised, and it will, during the term hereof, at its own sole cost and expense maintain, renew, replace and repair all of the same."

19. Upon the execution of said lease of May 19, 1922, the Junction surrendered possession of said lines of railroad and other railroad properties to the River Road. Thereupon the River Road took over the personnel of the Junction, except a few of its officers, and since that time the said properties so leased have been operated solely by the River Road under the name and caption of "Chicago Junction

Railway, Chicago River and Indiana Railroad Company, Lessee".

20. The Junction does not now have, and at no time since May 19, 1922, has had, any tariffs on file with the Interstate Commerce Commission. At no time since said date has it operated or in any way participated in the operation of the properties leased by it to the River Road, nor has it had any voice in the management or operation of the River Road or said properties so leased. At no time since said date has it had any operating or traffic department, officers or employees; nor has it been in the possession of said properties. Any changes in operating practices placed in effect on said properties on February 1, 1946, or at any time since May 19, 1922, were not suggested, made, authorized, participated in or concurred in by the Junction.

21. The Junction is, and at all times since May 19, 1922, has been, a non-operating, lessor railroad corporation. It has only three officers or employes, namely, a President, a Secretary and Treasurer, and an Auditor.

[fols. 74-75] 22. At no time since May 19, 1922, has the Junction had any traffic or operating relationships, arrangements or agreements with plaintiffs, the River Road or the Central, or with any other common carrier by railroad serving the City of Chicago. At all times since May 19, 1922 the sole activities of the Junction have been those of a non-operating, lessor railroad corporation, consisting principally of the collection and distribution of the rentals received under the aforesaid lease of May 19, 1922 to the River Road.

Dated at Chicago, Illinois, February 25, 1946.

E. S. Ballard, Wm. F. Price, Pope & Ballard, Attorneys for Plaintiffs, 120 South LaSalle Street, Chicago 3, Illinois. H. L. Underwood, Attorney for Interstate Commerce Commission, Intervening Plaintiff, 3341 I. C. C. Building, Washington, D. C. Sidney C. Murray, Marvin A. Jersild, Attorneys for Defendants The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, 536 LaSalle Street Station, Chicago 5, Illinois. Winston Strawn & Shaw, Guy A. Gladson, Bryce L. Hamilton, Attorneys for Defendant, Chicago Junction Railway Company, 1400 First National Bank Building, Chicago 3, Illinois.

[fol. 76] In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil No. 46 C 275

The Baltimore and Ohio Railroad Company, et al., Plaintiffs,

vs.

The Chicago River and Indiana Railroad Company, et al., Defendants

Interstate Commerce Commission, Intervening Plaintiff

Order Granting Temporary Injunction—March 14, 1946

This cause coming on to be heard on the motions of plaintiffs and intervening plaintiff for a preliminary injunction; and due notice having been given to defendants; and the Court having considered the stipulation of facts entered into by all of the parties hereto and having considered the arguments of counsel and being fully advised in the premises, makes the following

Findings of Fact

1. That plaintiffs are corporations organized and existing by virtue of the laws of the following states respectively: The Baltimore and Ohio Railroad Company, Maryland; [fol. 77] The Chesapeake and Ohio Railway Company, Virginia; Erie Railroad Company, New York; Grand Trunk Western Railroad Company, Michigan and Indiana; The New York, Chicago and St. Louis Railroad Company, New York, Pennsylvania, Ohio, Indiana and Illinois; The Pennsylvania Railroad Company, Pennsylvania; Pere Marquette Railway Company, Michigan; Wabash Railroad Company, Ohio; and respectively operate certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and are common carriers engaged in the transportation of property (including livestock) by railroad between Chicago, Illinois, and points in other states of the United States;

2. That defendant, The Chicago River and Indiana Railroad Company (herein called the River Road), is a corporation organized and existing by virtue of the laws of

the State of Illinois, and operates a line of railroad serving the Union Stock Yards, Chicago, Illinois, and connecting at Chicago, Illinois, with plaintiffs' respective lines of railroad and with the line of railroad of The New York Central Railroad Company, one of the defendants herein, and is a common carrier engaged in the transportation of property (including livestock) by railroad (in connection with various connecting common carriers by railroad, including plaintiffs and defendant, The New York Central Railroad Company, as their various routes may run) between said Union Stock Yards, Chicago, Illinois, and points in other states of the United States;

3. That defendant, Chicago Junction Railway Company (herein called the Junction), is a corporation organized and existing by virtue of the laws of the State of Illinois, and owns certain lines of railroad and leases certain other lines of railroad serving said Union Stock Yards, which lines (owned and leased) are leased to and operated by the River Road;

[fol. 78] 4. That defendant, The New York Central Railroad Company (herein called the Central), is a corporation organized and existing by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and operates certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and is a common carrier engaged in the transportation of property (including livestock) by railroad between such points;

5. That on May 16, 1922, and for many years prior thereto, plaintiffs or their predecessors in interest moved empty livestock cars used for the loading of livestock other than hogs and sheep (herein called stock cars) with their own power and crews from their respective lines, via their respective connections with the line now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of loading with their own power and crews over said line, via the connections of said line with their respective lines, and thence to destination as consigned and routed by the shippers. On and immediately prior to May 16, 1922, a charge of $1.00 per car, loaded and empty, was paid by plaintiffs

respectively or their predecessors in interest for the privilege of so moving said cars;

6. That on December 28, 1920, the Central filed with the Interstate Commerce Commission (herein called the Commission) its application for approval, *inter alia*, of the purchase by the Central of all of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction for a term of 99 years and thereafter, at the option of the lessee, in perpetuity, the proceeding on which application was known and described on the docket of the Commission as *Chicago Junction Case*, Finance Docket No. 1165. On May 16, 1922, [fol. 79] the Commission made and entered a report and order in said proceeding, whereby it approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows:

> "That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive."

The "carriers above named", referred to in the foregoing clause of said order were the River Road, the Junction and the Central. The conditions referred to in said clause included the following:

> "3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central."

After having enumerated in its said report the 17 conditions referred to in said clause, the Commission made the following finding:

> "Subject to the observance of the above conditions, we find that the acquisition by the Central of the

capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

Said report and order were duly served on defendants and each of them on May 18, 1922;

7. That on May 19, 1922, pursuant to the approval and [fol. 80] authorization granted in said order of May 16, 1922, the Central acquired control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000, and the River Road acquired control of the property (owned and leased) of the Junction by lease. Said control of the River Road by the Central and of the property of the Junction by the River Road has continued from that date down to the present time and is still in effect;

8. That on December 3, 1928, on the petition of the Central, the Junction and the River Road, the Commission made and entered its report on further hearing and order in said *Chicago Junction Case*, whereby it amended condition 14 of its report and order of May 16, 1922, which condition is irrelevant to the issues in this proceeding. Said report on further hearing and order were duly served on defendants and each of them on the 14th day of December, 1928. As so amended said report and order of May 16, 1922, are still in full force and effect;

9. That on January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain proceeding then pending before it entitled *The Baltimore & Ohio Railroad Company et al.* v. *United States of America et al.*, In Equity No. 3427, to which all of the plaintiffs herein or their respective predecessors in interest and all of the defendants herein were parties and in which one of the issues was the validity of the Commission's said order of May 16, 1922, entered a final decree, whereby it found and decreed with respect to said order as follows:

> "and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of Decem-

[fol. 81] ber 3, 1928, is valid and binding upon all of the parties.";

10. That on or about January 25, 1946, the Central and the River Road notified plaintiffs that on and after February 1, 1946, the Central and the River Road would not permit plaintiffs to continue to move stock cars as plaintiffs had theretofore moved the same as aforesaid and that, when such cars were destined to places of loading on the line of the River Road in said Union Stock Yards, plaintiffs would be required to deliver the same to the River Road at points of interchange with plaintiffs respectively on its line and such cars would then be moved by the power and crews of the River Road from such points of interchange to such places of loading and, after they had been loaded at such places of loading, would be moved thence by the power and crews of the River Road to points of interchange with plaintiffs respectively on the line of the River Road, and that at such points they would be delivered by the River Road to plaintiffs respectively, and that, instead of the charge of $1.00 per car, empty and loaded, theretofore paid by plaintiffs respectively to the River Road and accepted by it in full payment for the right to move such cars as theretofore, the River Road would demand and exact from plaintiffs respectively $12.96 per outbound loaded car as a division of the joint through rates on carload shipments of livestock other than hogs and sheep from said Union Stock Yards to destinations reached via plaintiffs' respective lines, pursuant to Chicago Switching Committee Division Sheet No. 12-J, issued by R. G. Raasch, Agent, effective June 1, 1945;

11. That after having been notified as aforesaid, plaintiffs and each of them made written protest to the Central and the River Road objecting to the aforesaid change and demanding that the traffic and operating arrangements theretofore in effect be continued;

[fol. 82] 12. That pursuant to said notification, on and at all times since February 1, 1946, the River Road has caused its employees to fail and refuse and said employees have failed and refused to throw the switches necessary to permit the power and crews of plaintiffs respectively to place stock cars at places of loading on the line of the River Road in said Union Stock Yards and to move said cars

from said places of loading, and have required plaintiffs' respective crews to place stock cars in an interchange yard on the line of the River Road and have required plaintiffs respectively to receive such cars, after the same have been loaded at other points on the line of the River Road, and said cars have been moved by the power and crews of the River Road from said interchange yard to points of loading on the line of the River Road in said Union Stock Yards and, after having been there loaded, back to other points on the line of the River Road, where they have been and are delivered by the River Road to plaintiffs respectively. At all times on and since February 1, 1946, the River Road has failed and refused and still continues to fail and refuse to permit plaintiffs to move stock cars as they had theretofore moved the same as aforesaid;

13. That the aforesaid change in operating arrangements which took place on February 1, 1946, constituted a discontinuance of traffic and operating relationships existing on and prior to May 16, 1922, between the Junction and the River Road on the one hand and plaintiffs on the other hand;

14. That on and after February 1, 1946, the Central failed to prevent the River Road from causing its employees to fail and refuse to throw the switches necessary to permit the power and crews of plaintiffs respectively to move stock cars to and from points of loading in said Union Stock Yards on the line of the River Road as they had theretofore moved such cars as aforesaid;

[fol. 83] 15. That on and after February 1, 1946, the Junction failed to prevent the River Road from causing its employees to fail and refuse to throw the switches necessary to permit the power and crews of plaintiffs respectively to move stock cars to and from points of loading in said Union Stock Yards on the line of the River Road as they had theretofore moved such cars as aforesaid;

16. That plaintiffs and each of them have been injured by being deprived of the trackage rights formerly enjoyed by them over the lines of the River Road to and from the loading platforms in the Union Stock Yards, by being deprived of direct access to shippers of livestock from said Union Stock Yards and of the opportunity to serve such shippers with plaintiffs' own power and crews respectively,

and by being made liable to the River Road for $12.96 per outbound loaded car of livestock other than hogs and sheep as a division of the joint through carload rate thereon instead of $2.00 per outbound loaded car as a trackage charge.

On the basis of the foregoing, the Court makes the following

Conclusions of Law

1. That the Court has jurisdiction of the parties to and the subject matter of this cause;

2. That plaintiffs and defendants are subject to Part I of the Interstate Commerce Act, Title 49, U. S. Code, Sections 1-27;

3. That this suit arises under paragraph 12 of Section 16 of Part I of the Interstate Commerce Act;

4. That the aforesaid operating arrangements which were in effect as between plaintiffs or their predecessors in interest respectively on the one hand and the River Road [fol. 84] and the Junction on the other hand on and prior to May 16, 1922, were traffic and operating relationships then existing between said carriers within the meaning of condition 3 of the report and order of the Interstate Commerce Commission of May 16, 1922, in Finance Docket No. 1165;

5. That by virtue of the aforesaid acquisition by the Central of control of the River Road through the purchase of its capital stock and acquisition of control by the River Road of the property (owned and leased) of the Junction by lease, all on May 19, 1922, pursuant to the approval and authorization granted by the Interstate Commerce Commission in its said order of May 16, 1922, the Central, the Junction and the River Road became obligated to abide by the conditions enumerated in said report and order of May 16, 1922, and, by operation of law, an agreement came into effect between the Central, the Junction and the River Road on the one hand and plaintiffs and other common carriers by railroad similarly situated on the other hand to abide by said conditions;

6. That from May 19, 1922, to the present time the Central has had and now has control of the traffic and operating relationships existing between the Junction and the

River Road on the one hand and plaintiffs respectively on the other hand;

7. That said report and order of May 16, 1922, was and is valid and binding on defendants and each of them;

8. The the aforesaid change in operating arrangements which took place on February 1, 1946, constituted a discontinuance of traffic and operating relationships existing on and prior to May 16, 1922, between the Junction and the River Road on the one hand and plaintiffs on the other hand, within the meaning of said order of May 16, 1922, and was and is a violation of said order and of condition 3 [fol. 85] of said order and was and is a breach of said agreement to abide by the conditions of said order and was and is a violation of paragraphs 2 and 4 of Section 5 of Part I of the Interstate Commerce Act;

9. That the River Road, the Central and the Junction and each of them were responsible for such discontinuance, were and are parties to such violation and were and are participants in such disobedience;

10. That the facts stated in paragraph 15 of the stipulation of facts are irrelevant and immaterial;

11. That plaintiffs and each of them are, within the meaning of paragraph 12 of Section 16 of Part I of the Interstate Commerce Act, parties injured by the aforesaid discontinuance of traffic and operating relationships existing on and prior to May 16, 1922, between the Junction and the River Road on the one hand and plaintiffs on the other hand, by the aforesaid violation of said order of May 16, 1922, and of condition 3 thereof, and by the aforesaid breach of said agreement to abide by the conditions of said order.

Wherefore, it is ordered, adjudged and decreed That, pending further order of this Court, the Chicago River and Indiana Railroad Company, Chicago Junction Railway Company and The New York Central Railroad Company, their respective officers, agents, representatives, employees and successors, and all other persons in active concert and

participation with them, be and they hereby are restrained and enjoined from

(a) failing and neglecting (with respect to the transportation of livestock other than hogs and sheep from said Union Stock Yards) to obey said order of the Commission of May 16, 1922, as amended;

(b) violating (with respect to the transportation of [fol. 86] livestock other than hogs and sheep from said Union Stock Yards) condition 3 of said order of the Commission of May 16, 1922, as amended;

(c) breaching (with respect to the transportation of livestock other than hogs and sheep from said Union Stock Yards) their agreement to abide by condition 3 of said order of the Commission of May 16, 1922, as amended;

(d) failing and refusing to permit plaintiffs respectively to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the line of the River Road to points of loading on said line in said Union Stock Yards and, after such cars have been loaded, so to move the same from said points of loading over the line of the River Road to plaintiffs' respective lines;

and commanded to permit plaintiffs respectively to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the line of The Chicago River and Indiana Railroad Company to points of loading in said Union Stock Yards and, after having been loaded, from said points over the line of The Chicago River and Indiana Railroad Company to plaintiffs' respective lines;

It is further ordered, adjudged and decreed that this order shall be effective from and after 11:59 P. M., March 15, 1946;

It is further ordered, adjudged and decreed that plaintiffs filed their bond, with corporate surety, to be approved by the Court, in the sum of $10,000.00, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

And it further ordered, adjudged and decreed that the motions of the Chicago Junction Railway Company to [fols. 87-88] dismiss the action as to it be, and they hereby are continued until final hearing.

Enter:

(Signed) Elwyn R. Shaw, Judge, U. S. District Court.

March 14, 1946.

[fols. 89-90] In the District Court of the United States

[Title omitted]

Order Denying Motions of Brotherhood of Railroad Trainmen—March 19, 1946

The Court being fully advised in the premises It Is Ordered that the motions of the Brotherhood of Railroad Trainmen by counsel for leave to file its special appearance herein and to vacate the temporary injunction and dismiss these proceedings because of failure to join indispensable parties be and they are hereby denied

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[fol. 91] In the District Court of the United States

[Title omitted]

Motion of Brotherhood of Railroad Trainmen for Leave to File Special Appearance—March 18, 1946

To the Honorable Elwyn R. Shaw, Judge of Said Court:

Now comes Brotherhood of Railroad Trainmen, an unincorporated association, appearing by Adams Nelson & Williamson, its attorneys, specially for the purposes of this motion and not generally, and moves the Court to grant leave to said Brotherhood of Railroad Trainmen to file its appearance herein specially and not generally, for the purpose of bringing to the attention of this Honorable Court the lack of jurisdiction herein due to the fact that certain parties indispensable to this proceeding are not joined, and for the purpose of moving to vacate the temporary injunction herein and to dismiss this proceeding on account of such non-joinder.

Wherefore, the Brotherhood of Railroad Trainmen prays that an order may be entered herein authorizing it to appear specially and not generally for the sole purpose of bringing [fol. 92] to the attention of this Honorable Court the lack of jurisdiction herein due to the fact that certain parties indispensable to this proceeding are not joined, and for the purpose of moving to vacate the temporary injunction herein and to dismiss this proceeding on account of such non-joinder.

Adams Nelson & Williamson, by Burke Williamson, Attorneys for Brother of Railroad Trainmen, appearing only and solely for the purpose of this motion and not generally, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

[fol. 93] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO VACATE TEMPORARY INJUNCTION AND TO DISMISS PROCEEDINGS FOR FAILURE TO JOIN INDISPENSABLE PARTIES—March 18, 1946

To the Honorable Elwyn R. Shaw, Judge of Said Court:

1. Now comes Brotherhood of Railroad Trainmen, an unincorporated association, and pursuant to leave of court first obtained to appear specially and not generally for the purpose of filing this motion, moves the court to vacate the temporary injunction herein and to dismiss this proceeding because of failure to join as parties defendant herein any of the yard work employees of the Chicago River and Indiana Railroad Company and the Chicago Junction Railway Company, Defendants herein, or the Brotherhood of Railroad Trainmen as representative of such employees.

2. Such employees or their representative are indispensable parties herein, as appears more particularly from Affidavit executed by William Bishop, Vice President, [fol. 94] Brotherhood of Railroad Trainmen and Felix E. Kazmer, General Chairman, Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company and Chicago Junction Railway Company, which Affidavit is attached hereto and made a part hereof.

Wherefore, Brotherhood of Railroad Trainmen prays that an order may be entered herein vacating the temporary injunction order issued herein on March 14, 1946 and dismissing the within proceeding.

Dated March 18, 1946.

Adams Nelson & Williamson, by Burke Williamson, Attorneys for Brotherhood of Railroad Trainmen, appearing solely for the purposes of the above motion and not generally, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

[fol. 95] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT

Now come William Bishop and Felix E. Kazmer, and being first duly sworn, depose and say:

1. Said Bishop is now serving and at all times mentioned herein was serving as Vice President of Brotherhood of Railroad Trainmen, an unincorporated association. He resides in the City of Evanston, State of Illinois, and has his office in Chicago, Illinois.

2. Said Kazmer is now serving and at all times mentioned herein was serving as General Chairman of Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company. He is an employee of the Chicago River and Indiana Railroad Company. He resides in the City of Chicago, State of Illinois.

3. The Brotherhood of Railroad Trainmen, an unincorporated association, has some 215,000 members throughout [fol. 96] the United States and Canada and acts as representative of many thousands of employees of carriers under the provisions of the Railway Labor Act (Title 45 U. S. C. A., Chap. 8).

4. The Brotherhood of Railroad Trainmen does now and has for many years last past represented employees in yard service of the Chicago River and Indiana Railroad Com-

pany, lessee of the Chicago Junction Railway Company, in collective bargaining with such lessee railroad. Such employees total some 400 men, substantially all of whom reside in the City of Chicago, State of Illinois. As a result of such collective bargaining said employees entered into an agreement with the Chicago River and Indiana Railroad Company, lessee of the Chicago Junction Railway Company, concerning rates of pay, rules and working conditions of such employees. This agreement, which is now and has been in effect for several years last past, is entitled: "Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement." Article III thereof is, in part, as follows:

"ARTICLE III

Defining Yard Work.

(a) The following shall be considered yard work, shall be handled by yardmen and shall be compensated for at not less than yard rates.

(b) The switching of all freight and passenger equipment operating exclusively within the switching limits;

(c) The transfer of all freight and passenger equipment operating exclusively within the switching limits;"

[fol. 97] Article X of said agreement is as follows:

"ARTICLE X

Seniority Privileges

(a) Seniority rights of yardmen will date from the time they enter the service continuous in yards or terminal where employed.

Yardmen.

(b) The right to preference of work and of promotion will be governed by seniority in service. The yardmen oldest in service will be given the preference, if competent.

(c) In the appointment of Yardmasters and Assistant Yardmasters the senior yardmen will, in all cases, be given full and unprejudiced consideration.

Switchtenders:

(d) Seniority rights of switchtenders will date from the time they entered the service continuous in yards or terminal where employed.

(e) The right to preference of work will be governed by seniority in service. The switchtender oldest in service will be given preference providing the applicant is competent."

Article XXIV of said agreement is, in part, as follows:

"ARTICLE XXIV

Adjustment of Controversies on Schedule.

Any controversy arising as to the application of the rules herein agreed upon to the schedule of the individual roads, between officers, yardmen and switchtenders, shall be taken up by the local committee and the local officials of the individual roads. In the event of failure on their part to agree on a satisfactory basis of settlement the Committee of the Brotherhood of Railroad Trainmen, representing the yardmen and switchtenders, may take up the question with the General Manager.

5. As a result of the aforesaid Chicago Memorandum of Agreement and its provisions with respect to the handling of yard work and seniority in such work, employees in such [fol. 98] service on the Chicago River and Indiana Railroad Company acquired a property right in and to all such work.

6. Some time ago a controversy arose between the employees in yard service of the Chicago River and Indiana Railroad Company and said company as to the interpretation of said Chicago Memorandum of Agreement, with particular reference to the handling of certain yard work by employees of other railroads on the tracks leased by the Chicago River and Indiana Railroad Company. On January 23, 1946 the Brotherhood of Railroad Trainmen, through the Affiant William Bishop, Vice President of Brotherhood of Railroad Trainmen, and Affiant Felix E. Kazmer, General Chairman, Brotherhood of Railroad Trainmen, the Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company, effected a

settlement of this controversy on behalf of the yard employees of the Chicago River and Indiana Railroad Company by written agreement with such company and the Chicago Junction Railway Company. This settlement interpretation was made under the provisions of the aforesaid ARTICLES III, X, and XXIV of said Chicago Memorandum of Agreement. The settlement interpretation is that referred to in paragraph 15 of the STIPULATION OF FACTS heretofore filed by the parties herein. By the terms of this settlement interpretation certain yard work on the tracks of the Chicago River and Indiana Railroad Company was to be handled by its own yard employees. The Complaint in the present proceeding seeks to nullify such [fols. 99-100] settlement interpretation, and to give such yard work on the tracks leased by the Chicago River and Indiana Railroad Company to employees of other railroads.

7. The Brotherhood of Railroad Trainmen, through these affiants, may act in a representative capacity for employees of the Chicago River and Indiana Railroad Company in yard service.

8. In the event the Chicago River and Indiana Railroad Company fails to give yard work to its yard employees in accordance with said Chicago Memorandum of Agreement and the settlement interpretation of January 23, 1946, such failure may result in claims by such employees against said railroad company for money damages and other relief.

9. Any action taken in this proceeding in the absence of yard employees of the Chicago River and Indiana Railroad Company or their representative will have an injurious effect on them for the reason that it may alter adversely the contract rights to which they are entitled under the said Chicago Memorandum of Agreement and said settlement interpretation of January 23, 1946 and may thus prejudice such employees in their right of collective bargaining.

William Bishop. Felix E. Kazmer.

Subscribed and sworn to before me this 16th day of March, 1946. Agnes Stasio, Notary Public. (Seal.)

[fol. 101] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

TRANSCRIPT OF PROCEEDINGS—Filed April 5, 1946

[fol. 102] Transcript of proceedings had in the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, in his courtroom, United States Court House, Chicago, Illinois, on Monday, March 18, 1946, 10 o'clock a.m.

Present:

Messrs. Pope & Ballard, by Mr. Ernest S. Ballard and Mr. William F. Price, on behalf of plaintiffs;

[fol. 103] Mr. Sidney C. Murray, on behalf of defendants The Chicago River and Indiana Railroad Company and The New York Central Railroad Company;

Messrs. Winston, Strawn & Shaw, by Mr. Guy A. Gladson, on behalf of defendant Chicago Junction Railway Company;

Mr. Harry L. Underwood, on behalf of Interstate Commerce Commission, Intervening Plaintiff;

Mr. Paul E. Blanchard, on behalf of Armour and Company;

Messrs. Adams, Nelson & Williamson, by Mr. Burke Williamson, on behalf of Brotherhood of Railroad Trainmen.

By the Clerk: The Baltimore and Ohio Railroad Company, et al., vs. The Chicago River and Indiana Railroad Company, et al. Motion for leave to file a special appearance of Brotherhood of Railroad Trainmen; motion of Brotherhood of Railroad Trainmen to vacate temporary injunction and dismiss proceedings for failure to join indispensable parties.

[fol. 104] Mr. Williamson: I appear this morning on behalf of Brotherhood of Railroad Trainmen. I ask leave to file their special appearance, to call your Honor's attention to the failure to join indispensable parties. The indispensable parties not joined here, your Honor, are the 400 employees of the Chicago River and Indiana Railroad Company. I ask leave to file the motion of the Brotherhood of Railroad Trainmen for leave to file their special appearance, for the purpose of calling to your Honor's attention this fatal defect of the parties.

I ask an order be entered granting leave to the Brotherhood of Railroad Trainmen to file that special appearance and to file also the motion of the Brotherhood of Railroad Trainmen to vacate the temporary injunction and to dismiss the proceedings for failure to join indispensable parties.

If your Honor grants me that permission I will enter my appearance this morning specially for that purpose.

The Court: Why should you enter a special appearance?

Mr. Williamson: Your Honor, the proceedings have gone so far now as to have been, for all practical purposes, decided on the merits. I do not wish, your Honor, to submit my client to the jurisdiction of the court so far as being [fol. 105] bound by all the action heretofore taken.

The Court: There has been no action taken except the issuance of the temporary injunction.

Mr. Williamson: Certain portions of the Court's findings of fact and conclusions of law as contained in the preliminary injunction constitute a finding on the merits. We, therefore, do not wish to subject ourselves to the general jurisdiction of the Court and be bound by the action already taken.

The Court: Well, either you are an indispensable party or you are not an indispensable party, one or the other; I don't know which it is. But it is one or the other. If you are an indispensable party, acts that have been taken heretofore without your being joined would not be binding on you.

Mr. Williamson: Yes.

The Court: If you are not an indispensable party, then you haven't any business in here.

Mr. Ballard: That is our position, if your Honor please.

Mr. Williamson: If your Honor please, without going into that, even if we are a necessary party we might be in here——

The Court: If you want to file a general appearance you may do so.

[fol. 106] Mr. Williamson: Your Honor, as to the extent to which we should be bound, as I understand it, your Honor would not wish us bound by any——

The Court: How can anybody be bound by anything when they are not a party to it?

Mr. Williamson: Your Honor, if the preliminary injunction, the findings of fact and conclusions of law stand, then these defendants, if we come in, will not have a hearing on

the merits, because that has already been had; Your Honor has already——

The Court: There has been no hearing on the merit.

Mr. Williamson: May I refer to the findings of fact and conclusions of law and the preliminary injunction, to indicate what I mean about the hearing on the merits?

The Court: Even so, if you are an indispensable party, that could not bind you, could it?

Mr. Williamson: No, but I think it is improper for the Court to take any action whatever if indispensable parties have been omitted. Your Honor, I suggest I be permitted to file these motions, that I file today a brief in support of them, and have your Honor fix dates for filing of briefs by interested parties, and that we go to a full hearing on it.

Mr. Ballard: It seems to us the motion is bad on its face for the very reason your Honor pointed out. It alleges [fol. 107] this petitioner, this movant—he is not a petitioner; he is a movant—that he is an indispensable party. Well, that is as much as to say he cannot be touched by anything done in this litigation.

Mr. Murray: It cannot be a jug-handle affair. He has to come in and enter his general appearance, if he is an indispensable party. Anything in the past is only a temporary injunction. I do not oppose him coming in and enter his general appearance.

The Court: If he is an indispensable party, then anything done to date is void.

Mr. Williamson: That is the position of the Brotherhood.

The Court: Then why a special appearance?

Mr. Williamson: Because the injunction was issued against four hundred members of the Brotherhood of Railroad Trainmen without making them parties and giving them sufficient notice of this proceeding.

The Court: Is that true?

Mr. Ballard: No, it did not run against them in their own right, only to the extent the injunction runs against the employees, agents and servants of the defendants. The extent that they are in that capacity, of course, they are enjoined by the injunction.

Mr. Williamson: There is no doubt at all that is the [fol. 108] effect of it. They are employees of the defendant The Chicago River and Indiana Railroad Company and are commanded by this Court to permit the plaintiffs, that is, these railroads, to move empty cars for loading livestock

other than hogs and sheep with their own power and crews over the lines of the Chicago——

The Court: Why shouldn't they be permitted to move their own cars over their own railroad?

Mr. Williamson: Their own railroad refers to the Chicago River and Indiana Railroad.

The Court: Why shouldn't they be permitted to move their own cars over their own railroad?

Mr. Williamson: Because, as set forth in this affidavit, the Brotherhood of Railroad Trainmen as collective bargaining agents for the 400 employees in yard service of The Chicago River and Indiana Railroad Company, entered into a written contract with The Chicago River and Indiana Railroad Company, giving to such employees the exclusive right to handle those movements of cars.

The Court: Could that contract affect a previously existing order of the Interstate Commerce Commission?

Mr. Williamson: Your Honor, this contract has been in effect for some time. There has been a controversy between the employees and the railroad for years, as to the effect—— [fol. 109] The Court: I am asking you about an order of the Interstate Commerce Commission: Could that contract affect that order?

Mr. Williamson: I am not here to argue the merits, but I would say that contract——

The Court: Then there is no use of having an Interstate Commerce Commission. You might as well turn this over to private bargaining.

Mr. Underwood: Not at all. We never know whether an order we will pass will be respected or not.

The Court: There will be no special appearance here. If you want to file a petition for leave to intervene, you may do so, but there will be no special appearance.

Mr. Williamson: Your Honor, may I present then the motion for the Brotherhood of Railroad Trainmen for leave to file special appearance, and may I present also the motion of the Brotherhood of Railroad Trainmen to vacate the temporary injunction and to dismiss the proceedings for failure to join indispensable parties, and have the——

The Court: You have already presented those, haven't you?

Mr. Williamson: Yes. I want to show, your Honor, that they were presented, and that your Honor denied the motion.

The Court: You want to preserve——

[fol. 110] Mr. Williamson: I want to be given leave to file the special appearance.

The Court: You want to preserve the record.

Mr. Williamson: Yes.

The Court: The Court Reporter has it, and the motion is overruled.

Mr. Williamson: Would your Honor consider setting it down this morning for hearing, before you make your final ruling, and give leave to file briefs, by me and the other parties, before you make a final ruling?

The Court: This isn't a final ruling. This is only a ruling that there will be no special appearance. I told you if you want to file a petition for leave to intervene I will take it under advisement, but I will not permit somebody to come into a lawsuit with a special appearance.

Mr. Williamson: The only purpose of the special appearance is to keep me from being bound by the action already taken.

The Court: You say in the same breath that the action is void for lack of necessary parties. The two positions are not consistent.

Mr. Williamson: We do not wish to take separate action against the railroad, if it makes a violation against this agreement. We want it all disposed of——

[fol. 111] The Court: If it makes a violation of the agreement, why don't you take separate action against them?

Mr. Williamson: There will be a multiplicity of suits, and we think the entire matter can be disposed of if we can come in and not be bound by the action to date.

The Court: If it is void, how can it be binding on you?

Mr. Williamson: I think it is, and I want it dismissed and to start all over again, and give us a chance to come in——

The Court: No. The answer is no.

Mr. Williamson: All right.

Mr. Murray: I don't want to take much time. When this matter came up before the Court the first time I stated that the Trainmen's organization was an indispensable party, and the Court continued the motion properly—I am not saying—until it could be disposed of on a permanent injunction. A temporary injunction was issued. I make no objection now to them coming in in the proper way in this proceeding, by entering their general appearance. That is a

fair way, fair with the Court, fair with us. That is my only objection that I make.

The Court: This Court intended to hold, right or wrong, that a unilateral agreement between a couple of parties can-
[fol. 112] not affect an order of the Interstate Commerce Commission. If that order is bad it must be attacked directly through the means provided by law, and not by a collateral agreement between two parties. That is my intention, to so hold, and that is what I held, so far as I know, unless there is something in the order which I overlooked.

Your position, I take it, is that the Trainmen can make an agreement with one of the parties that will affect, offset an order of the Interstate Commerce Commission which has been in force for many years. I take it that is your position.

Mr. Williamson: That is a question of the merits.

The Court: I don't know why you can't submit it to this Court as a matter of law, and then if it goes to the Circuit Court of Appeals or the United States Supreme Court, it can go on some kind of a simple record.

That is the only question involved, isn't it?

Mr. Williamson: I won't say on the merits that is the only question involved.

The Court: Isn't that substantially?

Mr. Williamson: That certainly is one of the questions.

The Court: Substantially, that is the question?

Mr. Williamson: Because, your Honor, I think there is a [fol. 113] possibility the case should have gone to the Interstate Commerce Commission without ever having come to your Honor.

The Court: That may be. I am not saying that is not true.

Mr. Williamson: That may be one of the points this defendant wishes to raise.

The Court: The only order this Court entered or intended to enter—as I say, there may be something in that order by inadvertence—I can't read the fine print in every order that is presented to me after the parties O. K. it as to form, but it was my intention to hold this matter in status quo until it could be finally decided.

Mr. Ballard: That is all you did.

The Court: And I understand also there is outstanding a controversy between the Trainmen and one of the railroads as against the rest of the railroads, because it is

claimed that this agreement upsets the effect of an order of the Interstate Commerce Commission, that was in force for many years.

The law provides means for repealing and changing orders of the Interstate Commerce Commission. If those means are to be followed, that is probably the proper remedy. Maybe this Court does not have jurisdiction. [fol. 114] Maybe there is an adequate remedy elsewhere, but I will not hold that one party can make any contract with one railroad and upset an order of the Interstate Commerce Commission.

Mr. Williamson: That is a question of the merits which we would like to be heard on.

The Court: If you want to be heard on that, get your general appearance on file, and file your petition for leave to intervene. I will not enter a special appearance.

Mr. Williamson: May I bring in a draft order?

The Court: If you want to file a petition for leave to intervene generally, it might be a way to get this thing to a head.

Mr. Williamson: I will consider that, your Honor.

Mr. Murray: I think I can bring them in, and probably will, the Enginemen, the Trainmen and Firemen, by a motion to bring them in as parties defendant if they won't come in.

The Court: I will not have a special appearance around here or any amicus curiae. People coming in will come in with both feet, and get their feet wet.

Mr. Williamson: I think if this had been called to your Honor's attention by anyone, whether in or out of the court, you could have acted on the motion, and that is what the [fol. 115] brief I propose to file indicates.

The Court: I am only going to run one lawsuit. You are either going to be in or out, either one.

Mr. Williamson: We will consider it further.

The Court: All right, call the next case.

[fols. 116-117] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 118-19] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING LEAVE TO FILE AMENDMENT TO COMPLAINT—April 12, 1946

This cause coming on to be heard on the motion of plaintiffs for leave to file an amendment to the Complaint herein instanter, and due notice having been given to the defendants, and the Court being fully advised in the premises, it is

Ordered that the plaintiffs be, and they hereby are, granted leave to file instanter an amendment to the Complaint herein.

And it is further Ordered that the time for the defendants to answer or otherwise move with respect to the Complaint herein as amended shall stand at April 19, 1946.

Enter: Walter J. La Buy, Judge of the United States District Court.

Dated April 12, 1946.

[fol. 120] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDMENT TO COMPLAINT HEREIN PURSUANT TO LEAVE OF COURT—Filed April 12, 1946

Now came the plaintiffs, and with leave of court first had and obtained, amend their original Complaint herein instanter as follows:

1. By striking our paragraph 7 of said Complaint and inserting in lieu thereof the following paragraph:

> 7. On May 16, 1922, and for many years prior thereto, plaintiffs or their predecessors in interest moved empty livestock cars used for the loading of livestock other than hogs and sheep (herein called stock cars) with their own power and crews from their respective [fol. 121] lines, via their respective connections with the line now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of

loading with their own power and crews over said line, via the connections of said line with their respective lines, and thence to destination as consigned and routed by the shippers. On and immediately prior to May 16, 1922, a charge of $1.00 per car, loaded and empty, was paid by plaintiffs respectively or their predecessors in interest for the privilege of so moving said cars.

The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, (S.) by William F. Price, their Attorney. 120 South La Salle Street, Chicago 3, Illinois.

Ernest S. Ballard, William F. Price, Pope & Ballard, 120 South La Salle Street, Chicago 3, Illinois, Randolph 6680, Attorneys for Plaintiffs.

[fols. 122-123] *Duly sworn to by J. M. Symes. Jurat omitted in printing.*

[fol. 124] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANTS, THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY (herein called the River Road) AND THE NEW YORK CENTRAL RAILROAD COMPANY (herein called the Central) TO PLAINTIFFS' COMPLAINT AS AMENDED —Filed May 6, 1946

First Defense

The complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

1. These defendants admit that on May 19, 1922, pursuant to the approval and authorization granted in the order of May 16, 1922, the Central purchased the capital stock of

the River Road at a price not exceeding the sum of $750,000 and the River Road leased the property (owned and leased) of the Chicago Junction Railway Company and that ownership of said capital stock by the Central and said lease by the River Road have continued from said date to the present time and are still in effect. These defendants [fol. 125] deny all other allegations and conclusions in paragraph 9 of the plaintiffs' complaint.

2. These defendants deny all of the allegations of paragraph 12 of the plaintiffs' complaint.

3. These defendants admit that on or about January 25, 1946, the River Road notified plaintiffs that on and after February 1, 1946, empty live stock cars (other than for hogs and sheep) destined to places of loading on the line of the River Road in the Union Stock Yards would be moved by the power and crews of the River Road from points of interchange with plaintiffs respectively on the line of the River Road to places of loading, and after they had been loaded at such places of loading, would be moved thence by the power and crews of the River Road to points of interchange with plaintiffs respectively on the line of the River Road, and that at such points they would be delivered by the River Road to plaintiffs respectively, and that on and after February 1, 1946, the River Road would charge and endeavor to collect from plaintiffs respectively as compensation for such switching services not less than $12.96 per outbound loaded car as a division of the joint through rates on carload shipments of livestock other than hogs and sheep from said Union Stock Yards to destinations reached via plaintiffs' respective lines, pursuant to Chicago Switching Committee Division Sheet No. 12-J, issued by R. G. Raasch, Agent, effective June 1, 1945. These defendants deny all other allegations and conclusions of paragraph 13 of the plaintiffs' complaint.

4. These defendants admit that after January 25, 1946, plaintiffs made written protest objecting to the procedure stated in paragraph 3 of this defense. These defendants deny all other allegations and conclusions of paragraph 14 of the plaintiffs' complaint.

5. These defendants admit that on and at all times since February 1, 1946, to and including March 15, 1946, the River Road has caused its employees to fail and refuse and such

employees have failed and refused to throw the switches necessary to permit the power and crews of plaintiffs respectively to place stock cars at loading places on the line of the River Road in the Union Stock Yards and to move [fol. 126] said cars from said loading places and has required plaintiffs' respective crews to place empty stock cars in an interchange yard on the line of the River Road which yard is used by plaintiffs respectively and the River Road for the interchange of cars, and has required plaintiffs respectively to receive such cars, after the same have been loaded, at other points on the line of the River Road, and said cars have been moved by the power and crews of the River Road from said interchange yard to points of loading on the line of the River Road in the Union Stock Yards, and after having been there loaded, back to other points on the line of the River Road, where they have been and are delivered by the River Road to plaintiffs respectively. These defendants deny all other allegations and conclusions of paragraph 15 of the plaintiffs' complaint.

6. These defendants deny all of the allegations of paragraph 16 of the plaintiffs' complaint.

7. These defendants deny all of the allegations of paragraph 17 of the plaintiffs' complaint.

8. These defendants admit that the Union Stock Yards is the largest livestock market and the largest shipping point of livestock in the world and that plaintiffs together with the Central are and have been for many years the principal carriers engaged in the transportation of live stock therefrom to points in the United States east and southeast of Chicago. These defendants allege that as to all other allegations of paragraph 18 of the plaintiffs' complaint, they are without knowledge or information sufficient to form a belief as to the truth of such allegations.

9. These defendants deny all of the allegations of paragraph 19 of the plaintiffs' complaint.

10. These defendants admit that plaintiffs have been, are and will be dependent upon the River Road for the placing of empty live stock cars for loading, and in hauling out loaded cars from places of loading to tracks for interchange with plaintiffs. These defendants deny all other allegations

[fol. 127] and conclusions of paragraph 20 of the plaintiffs' complaint.

11. These defendants deny all of the allegations of paragraph 21 of the plaintiffs' complaint.

12. These defendants admit that on and after February 1, 1946, plaintiffs have been, are and will be required to pay $12.96 (or such amount as is provided by said Division Sheet No. 12-J) instead of $2.00 per loaded car of live stock other than hogs and sheep moving from said Union Stock Yards via plaintiffs' respective lines. These defendants deny all other allegations and conclusions of paragraph 22 of the plaintiffs' complaint.

13. These defendants deny all of the allegations of paragraph 23 of the plaintiffs' complaint.

14. These defendants deny that they, or either of them, have violated condition 3 or any other part of the report and order of the Interstate Commerce Commission of May 16, 1922.

15. These defendants deny that condition 3, set forth in paragraph 8 of the plaintiffs' complaint, is applicable to or imposes any duty upon the defendant, River Road.

16. These defendants deny that any of the acts complained of in the plaintiffs' complaint was done by the defendant, the Central, and further deny that any of said acts so complained of was within the control of the defendant, the Central.

17. These defendants deny that condition number 3 is an order within the meaning of paragraph (12) of section 16 of the Interstate Commerce Act.

Third Defense

1. Certain employees of the River Road who perform work for that company in connection with the moving and switching of cars on its tracks and on the tracks leased to it by the Chicago Junction Railway Company are classed as yard trainmen (hereinafter referred to as trainmen) and for the purposes of the Railway Labor Act (Title 45, U. S. C. A. Sec. 151, et seq.) are represented by a labor [fol. 128] organization known as the Brotherhood of Railroad Trainmen.

2. Prior to January, 1946, said Brotherhood of Railroad Trainmen made demands (allegedly based by said Brotherhood upon a collective bargaining agreement known as the Chicago Memorandum of Agreement, to which said Brotherhood and the River Road were parties) that the work connected with the switching and spotting of stock cars on the tracks of the River Road and on the tracks leased to it by the Chicago Junction Railway Company incidental to the outbound movement of livestock be performed exclusively by employees of the River Road. Prior to January 23, 1946, the River Road consistently declined such demands and, at all times, denied and does now deny that such demands were supported by the said Chicago Memorandum of Agreement.

3. In January, 1946, a strike ballot was prepared by the Brotherhood of Railroad Trainmen and submitted to the trainmen employed by the River Road for their vote for or against a strike, unless the alleged grievances listed in said ballot were settled on a basis satisfactory to the officers of said Brotherhood. Said grievances listed on said ballot included the failure of the River Road to grant said demand that its trainmen perform the work connected with the switching and spotting of stock cars on the tracks of the River Road and on the tracks leased to it by the Chicago Junction Railway Compay incidental to the outbound movement of live stock.

4. The said Brotherhood of Railroad Trainmen subsequently informed the River Road that the trainmen employed by the River Road had voted almost unanimously in favor of such a strike. By letter, dated January 21, 1946, William Bishop, a Vice President of said Brotherhood, advised the River Road that a strike of its trainmen would commence at 10:30 P. M. on Wednesday, January 23, 1946, unless the River Road made settlement of the aforesaid grievances before that time. The River Road immediately sent such information to the Secretary of the National [fol. 129] Mediation Board. On January 23, 1946 the River Road received a telegram from the Secretary of the National Mediation Board stating that the President of the United States had that day created an emergency board to investigate the disputes on the River Road with certain of its employees represented by the Brotherhood of Railroad Trainmen. Subsequently on January 23, 1946, the

aforesaid William Bishop advised the River Road that the strike would proceed as planned notwithstanding the action of the President of the United States aforesaid.

5. On the evening of January 23, 1946 a conference was held between officials of the said Brotherhood of Railroad Trainmen and officers of the River Road. During said conference the said William Bishop stated to the officers of the River Road that unless certain demands, including the aforesaid demands with respect to switching and spotting of cars before and after being loaded with live stock, were granted by the River Road before 10:30 P. M. on said date, not only the trainmen employed by the River Road would strike but employees of other railroads operating in the City of Chicago, Illinois, would probably strike within eight hours after such time. Said Brotherhood officials refused to settle their demands on any basis which would permit the River Road to allow crews of railroads other than the River Road to move live stock cars used for the loading of live stock (other than hogs and sheep) to the places of loading on the lines of the River Road and to move said cars away from such places after loading.

6. At approximately 9:50 P. M. on January 23, 1946, an agreement was executed by the said Brotherhood and the River Road which, among other provisions, contained the following:

> "It is further agreed that foreign line crews will be allowed to come in with their stock, unload and take their empties out with them.
>
> It is further agreed that all stock cars to be loaded will be switched and spotted by C. J. crews and foreign line crews may pick them up from designated tracks to which they have been switched by C. J. crews, effective February 1, 1946.
>
> It is further agreed that foreign line crews will be allowed to bring in their dead freight set out at Ashland Avenue and proceed to the stock chutes, and take their empties back."

[fol. 130] Said agreement was entered into by the River Road solely to prevent the said threatened strike. As a result of said agreement said strike was called off by the said Brotherhood a few minutes before the time set for

it to commence. (A copy of said agreement of January 23, 1946 is attached hereto as Exhibit "A" and made a part hereof.)

7. Said agreement of January 23, 1946 was put into effect by the River Road on February 1, 1946 and as a result thereof trainmen employed by the River Road on and after February 1, 1946 and until March 15, 1946 performed the work incidental to the switching and spotting of live stock cars before and after being loaded on the tracks of the River Road and on the tracks leased to it by the Chicago Junction Railway Company.

Fourth Defense

These defendants adopt and reallege as a part of this defense, as though fully set out herein, the averments contained in the Third Defense above, and further allege that the complaint of plaintiffs fails to state a claim against defendants upon which relief can be granted in that the acts of defendant, the River Road, complained of by plaintiffs were required in the performance of the common carrier duties of said defendant imposed upon it by the Interstate Commerce Act and the Railway Labor Act, as amended, and were necessary in the public interest.

The New York Central Railroad Company, The Chicago River and Indiana Railroad Company, by Sidney C. Murray, Marvin A. Jersild, Their Attorneys, 1236 LaSalle Station, Wab. 4200.

Duly sworn to by Jesse L. McKee. Jurat omitted in printing.

[fol. 131] Received a copy of the above and foregoing answer, together with the Exhibit attached thereto, this 6th day of May, 1946.

E. S. Ballard, William F. Price, Pope & Ballard, Attorneys for Plaintiff.

Received a copy of the above and foregoing answer, together with the Exhibit attached thereto, this 6th day of May, 1946.

Ralph M. Shaw, Guy A. Gladsoe, B. L. Hamilton, Attorneys for Defendant, Chicago Junction Railway Company.

[fol. 132] EXHIBIT "A" TO ANSWER

Chicago, January 23, 1946.

Chicago Junction Railway

(The C. R. & I. R. R. Co., Lessee)

The Chicago River & Indiana Railroad Company

Memorandum

Settlement of claims involved in strike ballot of January 7, 1946 by the Brotherhood of Railroad Trainmen and the Chicago Junction Railway (C. R. & I. R. R. Co. Lessee) Chicago River & Indiana Railroad Company.

1)—Claims 1, 2, 3, 4, 14, 15, 28, 29, 30 and 31 will be Settled on the following bases.

Claims 14, 15, 28, 30 and 31 are withdrawn.

Claims 1, 2, 3, 4 and 29 are settled on the following bases:

It is agreed that crews operating into Chicago Junction Yards will be allowed to set out at two points, namely—Leavitt Street and Ashland Avenue South Yard.

It is further agreed that outbound crews will be allowed to pick up at two points, namely—Leavitt Street and Ashland Avenue North Yard or Loomis Street.

It is further agreed that foreign line crews will be allowed to come in with their stock, unload and take their empties out with them.

It is further agreed that all stock cars to be loaded will be switched and spotted by C. J. Crews and foreign line crews may pick them up from designated tracks to which they have been switched by C. J. Crews, effective February 1, 1946.

(See Note following item 9)

These claims 1, 2, 3, 4 and 29 will be paid.

2)—Claims 5, 6, 7 and 8 shall be settled by allowing crews coupling air at Halsted Street, Ashland Avenue North Yard (including Damen Avenue Yard), Oakley Avenue, Pennsylvania 35th Street Yard and foreign yards a day of eight (8) hours at pro rata rate on dates when such service was performed. At other points an independent allowance of

one hour at pro rata rate will be paid and in future, crews will not couple air in the yards where car men are employed, namely—Halsted Street, Ashland Avenue North Yard (including Damen Avenue Yard), Oakley Avenue, Pennsylvania 35th Street Yard and foreign yards without a written order so to do from the Yardmaster and when so required, will be paid an independent allowance of eight (8) hours' pay at pro rata rates. In other yards where such couplings are made, an independent allowance of one hour's pay at pro rata rates will be made. No allowance of any kind will be made for coupling air hose between caboose and balance of train, between engine and train or between cuts of cars that are doubled where one track would not hold the entire train.

[fols. 133-134] 3)—Claim No. 9—Protest of yardmen account of appointment of yardmasters, etc. The yardmen involved will be given a seniority date on the Yardmasters' Seniority Roster in each case immediately preceding the date of the yardmasters junior to the man involved.

4)—Claims 10, 11, 12, 25, 26—These claims are withdrawn.

5)—Claim No. 13: Claim of Yard Foreman Davlin and others, etc. This claim will be settled on the basis of paying one crew one day's pay at pro rata rates on dates when the work alleged in this claim was performed.

6)—Claims 16, 17, 19, 21, 22, 23, 24, 27, 32 and 34 will be paid.

7)—Claims 18 and 33 will be paid.

8)—Claim No. 35: Claim of unassigned yardmen for a minimum day, etc. Starting with January 1, 1942 one unassigned yardman will be allowed a day's pay at foreman's rate (eight (8) hours at pro rata rates) on each date that such self-propelled machine was operated as alleged in this claim, in full settlement thereof.

9)—Claim of F. Andziewicz, F. E. Kazmer, etc. will be paid. This claim is No. 20 on the ballot.

Note: In connection with Item 1; It is further agreed that foreign line crews will be allowed to bring in their

dead freight set out at Ashland Avenue and proceed to the stock chutes, and take their empties back.

Signed this 23rd day of January, 1946 at Chicago, Illinois.

(S.) J. L. McKee, Vice President New York Central Railroad Co., Chicago Junction Railway (C. R. & I. R. R. Co. Lessee), Chicago River & Indiana Railroad Company. William Bishop, Vice President Brotherhood of Railroad Trainmen.

[fol. 135] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO INTERVENE AS DEFENDANT—Filed May 20, 1946

To the Honorable Elwyn R. Shaw, Judge of Said Court:

Now comes Applicant, the Brotherhood of Railroad Trainmen, an unincorporated association, hereinafter sometimes referred to as the Brotherhood, and moves for leave to intervene as Defendant in this proceeding and alleges as follows:

1. The Brotherhood now acts and for many years last past has acted as collective bargaining representative for all persons employed as trainmen by the Defendant The Chicago River and Indiana Railroad Company, in accordance with the provisions of the Railway Labor Act (45 U. S. C. A. Chap. 8). As a result of such collective bargaining said employees, through the Brotherhood, entered into an agreement with said Defendant carrier concerning [fol. 136] rates of pay, rules, and working conditions, known as "Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement" which is now and has been in effect for several years last past. Under the terms of this agreement said employees are entitled to all work performed by trainmen on the lines of said Defendant carrier.

2. In spite of the provisions of the aforesaid agreement as to rates of pay, rules, and working conditions, the Defendant The Chicago River and Indiana Railroad Company for

many years permitted employees of other railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of the Defendant The Chicago River and Indiana Railroad Company to points of loading on said lines in the Union Stock Yards, Chicago, Illinois, and, after such cars had been loaded, so to move the same from said points of loading over the line of said carrier to lines of said other railroads.

3. As a result of the practice described in the preceding paragraph, employees as trainmen of the Defendant The Chicago River and Indiana Railroad Company for some time protested through the Brotherhood to said carrier against this violation of their agreement concerning rates of pay, rules, and working conditions. Such employees of said carrier made protest and, as set forth in paragraph 15 of the STIPULATION OF FACTS heretofore filed by the other parties herein, notified said carrier that unless this labor dispute, and certain other labor disputes, were [fol. 137] settled before 10:30 P. M. January 23, 1946 such employees would go out on strike at that hour. On that date the Brotherhood, through William Bishop, its Vice President, and Felix E. Kazmer, General Chairman, Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company, effected a written settlement with said carrier of this controversy on behalf of the employees as trainmen of said carrier. This settlement was in the form of a written interpretation made under the provisions of the existing agreement described in paragraph 1 above. This settlement interpretation is that referred to in paragraph 15 of the STIPULATION OF FACTS heretofore filed by the parties herein. By the terms of this settlement interpretation said carrier put an end to the practice of permitting employees of other railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of the Defendant The Chicago River and Indiana Railroad Company to points of loading on said lines in the Union Stock Yards, Chicago, Illinois, and, after such cars have been loaded, so to move the same from said points of loading over the lines of said carrier to lines of said other railroads. Further, as a result of this settlement interpretation, said work was to be performed by the employees as trainmen, engineers, and fire-

men and enginemen of said Defendant The Chicago River and Indiana Railroad Company. Said work was so performed in accordance with the said settlement interpretation until such employees were illegally, wrongfully and improvidently enjoined therefrom, without notice or opportunity to be heard, by order entered herein on March 14, 1946.

[fol. 138] 4. The Complaint in this proceeding was filed February 12, 1946. This suit involves and grew out of the above-described labor dispute. It seeks affirmative injunctive relief against the Defendant The Chicago River and Indiana Railroad Company and its employees to command them to permit the plaintiff railroad companies to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of said Defendant carrier to points of loading on its lines in the Union Stock Yards and, after such cars have been loaded, to move them from the points of loading over the lines of said Defendant carrier to the lines of the plaintiff railroad companies. It was and is, therefore, the primary purpose of this suit to nullify the above-described settlement interpretation of the employees' agreement concerning rates of pay, rules, and working conditions, and thus to alter the agreement itself, so as to deprive the employees of said Defendant carrier of their property rights under said agreement by enjoining them from performing the work to which they are entitled thereunder, in a suit to which they are not made parties, all without notice to said employees and without affording them an opportunity to be heard, and without compliance with the laws relating to injunctions in labor disputes, and notwithstanding that the employees of said Defendant carrier are actually the persons adversely affected by the relief sought by Plaintiffs, and are therefore the real parties in interest as defendants herein.

5. On February 18, 1946 there was filed herein the appearance of Sidney C. Murray as attorney for the Defendants [fol. 139] The Chicago River and Indiana Railroad Company and the New York Central Railroad Company.

6. On February 21, 1946 an order was entered herein on the motion of the Interstate Commerce Commission granting it leave to intervene as a party plaintiff and to file a complaint of intervention.

7. On February 21, 1946 the motion of the Plaintiffs for a preliminary injunction was taken under advisement, and the parties were granted leave to file an agreed statement of facts and briefs by February 26, 1946.

8. On February 25, 1946 a STIPULATION OF FACTS was filed. On the same day the motion of the Interstate Commerce Commission, intervening Plaintiff, for a preliminary injunction was taken under advisement.

9. On March 14, 1946 an order was entered making findings of fact and conclusions of law, and a preliminary injunction was issued as requested by Plaintiffs. Bond was fixed in the sum of $10,000. The motion of the Defendant Chicago Junction Railway Company to dismiss it as a party defendant was continued to the final hearing.

10. On March 18, 1946 the motion of the Brotherhood of Railroad Trainmen to file its special appearance and motion to vacate the temporary injunction and dismiss the proceedings for failure to join indispensable parties was denied.

11. On March 26, 1946 the Defendant Chicago Junction [fol. 140] Railway Company filed its notice of appeal against the refusal of the court to dismiss the action as to that Defendant, and in April, 1946 this appeal was perfected.

12. On April 12, 1946 a order was entered giving Plaintiffs leave to file instante an amendment to the Complaint, and such amendment was filed. The amendment did not change the relief sought. On April 16, 1946 an order was entered by stipulation extending the time for the Defendants The Chicago River and Indiana Railroad Company and the New York Central Railroad Company to plead to and including May 10, 1946, and such Defendant filed their answer to the Complaint, as amended, on May 6, 1946.

13. The Brotherhood of Railroad Trainmen may properly act in a representative capacity in this litigation for employees as trainmen of the Defendant The Chicago River and Indiana Railroad Company.

14. The Brotherhood has a right to intervene because it is an indispensable party herein and it also has a right to

intervene under Rule 24(a) of the Rules of Civil Procedure for District Courts of the United States, as follows:

(1) A statute of the United States confers on it an unconditional right to intervene (49 U. S. C. A. 17 (11));

(2) The representation of the Brotherhood's interest herein by the Defendants The Chicago River and Indiana Railroad Company and the New York Central Railroad Company is inadequate, particularly as follows:

(a) To the extent that Plaintiffs' Complaint herein seeks [fol. 141] to relieve said Defendants of their duties and obligations under the said settlement interpretation by enjoining them from performing the same, said Defendants have an interest which is adverse to the Brotherhood and which is in common with Plaintiffs' interest herein;

(b) Said Defendants did not oppose the intervention of the Interstate Commerce Commission as a party plaintiff herein, notwithstanding that such intervention was improper for the following reasons:

The effect of such intervention was to relieve plaintiff railroads of the necessity of proving injury as alleged in their Complaint, which they were bound to do under the provisions of the Interstate Commerce Act (49 U. S. C. A. 16 (12));

Said Act does not permit the Interstate Commerce Commission to join with individual railroads for the purpose of suing to enjoin alleged violations of a Commission order;

Said Act also provides (49 U. S. C. A. 5 (2) (f) that, notwithstanding any of the other provisions thereof, agreements between a carrier and its employees pertaining to the protection of the interests of the employees may be entered into at any time, and therefore the said Commission has no right to take a partisan position, in company with certain individual carriers, and to align itself with them to urge such an interpretation of a Commission order as will deny to railroad employees the right to make an agreement with their employer through collective bargaining and pursuant to said Act; and

[fol. 142] Said Commission has no right under 29 U. S. C. A. 51-53 or under the Norris-LaGuardia Act

(29 U. S. C. A. 101-115) to become a party plaintiff in a suit for the issuance of an injunction growing out of or involving a labor dispute.

(c) Said Defendants filed no answer in opposition to Plaintiff's Complaint, as amended, until May 6, 1946;

(d) Said Defendants presented no witnesses at any hearing in opposition to Plaintiffs' application for a preliminary injunction, or otherwise, and said Defendants confined themselves to signing and filing with the then parties to this suit a Stipulation of Facts which was wholly inadequate to indicate to the Court that this suit involves and grew out of a labor dispute and that any action taken by the Court must be in compliance with the laws relating to injunctions in labor disputes;

(e) Said Defendants have not invited the Court's attention to the applicability of 29 U. S. A. 51-53 or of the Norris-LaGuardia Act (29 U. S. C. A. 101-115) or to the case of *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc* (126 Fed. (2d) 931, C. C. A. 10th, 1942; certiorari denied in 317 U. S. 645, 87 L. Ed. 519), which said Acts and decision are clearly applicable to the issues herein and would, if applied, require dismissal of Plaintiffs' Complaint;

(f) Said Defendants have not invited the Court's attention to the applicability of the case of *Gulf, Mobile &* [fol. 143] *Northern Railroad Company* v. *Illinois Central Railroad Company*, (21 Fed. Supp. 282 (District Court Tennessee 1937; appeal dismissed by stipulation in 109 Fed. 2d 1016) which decision is also clearly applicable to the issues involved herein and would, if applied, require dismissal of Plaintiffs' Complaint;

(g) Said Defendants have not invited the Court's attention to 49 U. S. C. A. 5 (2) (f), a statutory provision which is so clearly adverse to Plaintiffs' case that Plaintiffs in their brief in support of their motion for a preliminary injunction believed it necessary to devote two pages in an attempt to show it inapplicable. (pp. 18, 19, and 20.) Further, the Defendant New York Central Railroad Company itself made an agreement on April 22, 1946 with its employees pursuant to this statute in connection

with acquisition by the Baltimore and Ohio Railroad Company of certain trackage rights between Toledo, Ohio and Detroit, Michigan.

(h) Said Defendants made only formal objection to the preliminary injunction order of March 14, 1946 even though certain findings of fact and conclusions of law therein contained constituted in effect a decision of the case on the merits as it then stood. The findings and conclusions referred to by the Applicants in the preliminary injunction order are as follows: Paragraph 13 of the Findings of Fact; paragraphs 4, 8, 10, and 11 of the Conclusions of Law. Further, said order fixed Plaintiffs' bond in the sum of only $10,000, a wholly inadequate amount;

(i) Said Defendants have taken no action to force the Plaintiffs to amend their Complaint to join the Brotherhood [fol. 144] as a party defendant, even though said Defendants have stated in open Court that they regarded the Brotherhood as an indispensable party. After the Court on March 18, 1946 denied the motion of the Brotherhood of Railroad Trainmen to file its special appearance and motion to vacate the temporary injunction and dismiss the proceedings for failure to join indispensable parties, which first motion was opposed by said Defendants, the Brotherhood inquired of said Defendants on March 23, 1946 whether they would take action to require the Plaintiffs to join that Brotherhood as a party defendant, and stated that the Brotherhood would seek to intervene if said Defendants did not take such action. Said Defendants stated then and on two subsequent occasions that it was their present intention to take such action by the filing of a petition at an early date, and, at the same time, to seek to require that the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen also be joined. Said Defendants failed to file such a petition. On April 15, 1946 the Brotherhood, through its attorneys, made written inquiry of the attorney for said Defendants as to whether and when said Defendants would file such petition, but has received no reply from such attorney. On May 6, 1946 said Defendants filed their Answer to Plaintiffs' Complaint, as amended, but did not in said Answer allege that the Brotherhoods mentioned or any of them were indispensable parties. The Brotherhood must therefore assume that said Defendants will

take no action to force the Plaintiffs to make any of the Brotherhoods parties to this litigation. The Brotherhood believes that the early disposition of this litigation would [fol. 145] have been served if said Defendants had filed a petition to force the Plaintiffs to join said Brotherhoods as parties, and the Brotherhood will not take such action with respect to the said two other Brotherhoods;

(j) The preliminary injunction entered herein commands employees of the Defendant The Chicago River and Indiana Railroad Company to permit Plaintiffs to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of that carrier to points of loading on that line in the Union Stock Yards and, after such cars have been loaded, so to move the same from said points of loading over the lines of that carrier to Plaintiffs' lines. Plaintiffs request the same permanent relief against said employees, who therefore may be bound by judgment entered herein.

15. The Brotherhood alleges, in the alternative, that it should be permitted to intervene under Rule 24(b) of the Rules of Civil Procedure for District Courts of the United States as follows:

(1) A statute of the United States confers a conditional right to intervene. (49 U. S. C. A. 17 (11).)

(2) Applicant's claim or defense and the main action have a question of law or fact in common in that Plaintiffs' claim as to the legal effect of the order of the Interstate Commerce Commission of May 16, 1922 as to the operations of the Defendant The Chicago River and Indiana Railroad Company necessarily carries with it the question of the legal effect of this order with respect to the relations of the said carrier and its employees.

[fol. 146] 16. The intervention sought will not unduly delay or prejudice the adjudication of the rights of the original parties.

17. Attached hereto is copy of Motion of Brotherhood of Railroad Trainmen to Vacate Preliminary Injunction, to Assess Damages Against Plaintiffs, and for Summary Judgment. This pleading sets forth the present claim or defense for which intervention is sought.

Wherefore, the Brotherhood, as Applicant, prays that an order may be entered granting it leave to intervene as Defendant and to file instanter the attached Motion, and granting it such other and further relief as may be just.

Dated: May 11, 1946.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Applicant, 39 S. LaSalle St., Chicago 3, Illinois. Franklin 2411.

[fol. 147] District of the United States,
State of Illinois,
County of Cook, ss:

Now comes Felix E. Kazmer and, being first duly sworn, deposes and says that:

1. He is now serving and has for several years last past served as General Chairman of Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company. He is an employee of the Chicago River and Indiana Railroad Company. He resides in the City of Chicago, State of Illinois.

2. He has read the above and foregoing Motion, knows the contents thereof, and the same is true, except as to statements of action taken in this proceeding and of legal conclusions, as to which matters he is without adequate knowledge to make affidavit.

Felix E. Kazmer.

Subscribed and sworn to before me this 11th day of May, 1946. Lucile M. Ingham, Notary Public. (Seal.)

[fol. 148] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO VACATE PRELIMINARY INJUNCTION, TO ASSESS DAMAGES AGAINST PLAINTIFFS, AND FOR SUMMARY JUDGMENT

To the Honorable Elwyn R. Shaw, Judge of Said Court:

Now comes the Defendant the Brotherhood of Railroad Trainmen, an unincorporated association, hereinafter sometimes referred to as the Brotherhood, and invites attention to the Affidavit hereto attached and made a part hereof, and moves the Court to:

1. Vacate the preliminary injunction entered herein on March 14, 1946:

(a) For failure to join indispensable parties prior to the issuance of said injunction and prior to any hearings had on Plaintiffs' application therefor, especially as follows:

[fol. 149] (1) When such injunction was entered on that date no employee as trainman, engineer, fireman, or engineman of the Defendant The Chicago River and Indiana Railroad Company, or any qualified representative of any such employee, was a party to this proceeding;

(2) Employees as trainmen, engineers, firemen and enginemen of the Defendant The Chicago River and Indiana Railroad Company, or their qualified representatives, were and are indispensable parties to this proceeding;

(3) In the absence of such employees or their representatives as parties herein the Court lacked jurisdiction over the subject matter of the within suit;

(4) The issuance of a preliminary injunction in a suit of which the Court lacked jurisdiction was improper, and said injunction was improvidently issued.

(b) For failure to comply with the provisions of 29 U. S. C. A. 51-53 or with the provisions of the Norris-LaGuardia Act (29 U. S. C. A. Sec. 101-115) regarding

jurisdiction of United States Courts to issue injunctions in cases involving or growing out of labor disputes, particularly as follows:

(1) No testimony of witnesses was heard in open court (with opportunity for cross-examination) in support of the Complaint, and no opportunity was afforded for testimony in opposition thereto;

(2) No finding was made, based on competent evidence as aforesaid, that unlawful acts have been [fol. 150] threatened or committed and will be committed or continued unless restrained;

(3) No finding was made, based on competent evidence as aforesaid, that substantial and irreparable injury to Plaintiffs' property will follow;

(4) No finding was made, based on competent evidence as aforesaid, that as to each item of relief granted greater injury will be inflicted upon Plaintiffs by denial of relief than will be inflicted upon Defendants by the granting of relief;

(5) No finding was made, based on competent evidence as aforesaid, that the public officers charged with the duty of protecting Plaintiffs' property are unable or unwilling to furnish adequate protection;

(6) Notice of the hearing on Plaintiffs' application for said injunction was not given or directed to be given to all known persons against whom relief was sought or allowed, including the employees of Defendant The Chicago River and Indiana Railroad Company, who were sought to be and were enjoined, nor was such notice given or directed to be given to the public officials charged with the duty to protect Plaintiffs' property;

(7) A bond was not filed by Plaintiffs in an amount sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erro- [fol.151] neous issuance of said injunction, including all reasonable costs, attorneys' fees and expenses of defense; and

(8) No finding was made, based on competent evidence as aforesaid, that Plaintiffs have complied with all obligations imposed upon them by law involved in

the labor dispute herein, and have made every reasonable effort to settle such dispute.

2. Assess against the Plaintiffs and their sureties all costs and damages incurred or suffered by employees as trainmen of the Defendant The Chicago River and Indiana Railroad Company, including their attorneys' fees, arising out of the wrongful and improvident issuance of the preliminary injunction herein.

3. Grant a summary judgment in favor of this Defendant under Rule 56(b) of the Rules of Civil Procedure for District Courts of the United States:

(a) For lack of jurisdiction over the subject matter, inasmuch as no employee as engineer, fireman, or engineman of the Defendant The Chicago River and Indiana Railroad Company, or any qualified representative of any such employee, is a party to this proceeding and such employees, or their qualified representatives, are indispensable parties to this proceeding.

(b) For failure to state a claim upon which relief can be granted in that:

(1) Plaintiffs' Complaint, as amended, does not contain allegations which satisfy the mandatory require- [fol. 152] ments of 29 U. S. C. A. 51-53 or of the Norris-LaGuardia Act (29 U. S. C. A. 101-115) on which testimony could be heard or findings might be based as set forth in sub-paragraph 1(b) above.

(2) Plaintiffs' Complaint, as amended, does not contain allegations of any violation of the order of the Interstate Commerce Commission of May 16, 1922, as amended, and of the agreement of the Defendant carriers arising out of said order, and of the Interstate Commerce Act; or, in the alternative.

(3) If Plaintiffs' Complaint, as amended, be held to contain allegations of a violation of the order of the Interstate Commerce Commission of May 16, 1922, as amended, then this Court should not enjoin such violation for the reasons that:

The Commission did not have jurisdiction to issue such order;

The amendment to the Interstate Commerce Act found in 49 U. S. C. A. 5 (2) (f) is applicable; and

The public interest requires that no injunction be issued.

4. Grant the Brotherhood leave in its discretion to answer the allegations of the Complaint, as amended, if the Motion for Summary Judgment be denied.

[fol. 153] 5. Grant the Brotherhood such other and further relief as may be just.

Dated: May 11, 1946.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen, 39 South LaSalle Street, Chicago 3, Illinois, Franklin 2411.

[fol. 154] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF FELIX E. KAZMER

Now comes Felix E. Kazmer and, being first duly sworn, deposes and says:

1. He is now serving and has for several years last past served as General Chairman of Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company, Lessee of Chicago Junction Railway Company. He is also Chairman of the Joint Committee of the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Engineers, and the Brotherhood of Locomotive Firemen and Enginemen, The Chicago River and Indiana Railroad Company. He is an employee of The Chicago River and Indiana Railroad Company. He resides in the City of Chicago, State of Illinois. He makes this Affidavit on personal knowledge.

2. The Brotherhood of Railroad Trainmen now acts and for many years last past has acted as collective bargaining representative for all persons employed as trainmen by The Chicago River and Indiana Railroad Company, in accordance with the provisions of the Railway Labor Act. As a

[fol. 155] result of such collective bargaining said employees, through said Brotherhood, entered into an agreement with said carrier concerning rates of pay, rules, and working conditions known as "Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement" which is now and has been in effect for several years last past. A true and correct copy of this Agreement is attached hereto, marked "Exhibit A," and made a part hereof. Under the terms of this agreement said employees are entitled to all work performed by trainmen on the lines of said carrier.

3. The Brotherhood of Locomotive Engineers now acts and for many years last past has acted as collective bargaining representative for all persons employed as engineers by The Chicago River and Indiana Railroad Company, in accordance with the provisions of the Railway Labor Act. As a result of such collective bargaining said employees, through said Brotherhood, entered into an agreement with said carrier concerning rates of pay, rules, and working conditions, known as "Schedules of Wages and Articles of Agreement between Chicago Junction Railway, The Chicago River and Indiana Railroad Company and Engineers" which is now and has bee in effect for several years last past. As a result of this agreement said employees are entitled to all work performed by engineers on the lines of said carrier.

4. The Brotherhood of Locomotive Firemen and Enginemen now acts and for many years last past has acted as collective bargaining representative for all persons employed as firemen and enginemen by The Chicago River and Indiana Railroad Company, in accordance with the provisions of the Railway Labor Act. As a result of such collective bargaining said employees, through said Brotherhood, entered into an agreement with said carrier concerning rates of pay, rules, and working conditions, known [fol. 156] as "Schedule of Wages and Articles of Agreement between the Chicago Junction Railway Company and The Chicago River and Indiana Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen" which is now and has been in effect for several years last past. As a result of this agreement said employees are entitled to all work performed by firemen and enginemen on the lines of said carrier.

5. In spite of the provisions of the three aforesaid agreements as to rates of pay, rules, and working conditions, The Chicago River and Indiana Railroad Company for many years permitted employees of other railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of The Chicago River and Indiana Railroad Company to points of loading on said lines in the Union Stock Yards, Chicago, Illinois, and, after such cars have been loaded, so to move the same from said points of loading over the lines of said carrier to lines of said other railroads.

6. As a result of this practice, employees as trainmen, engineers, and firemen and enginemen of The Chicago River and Indiana Railroad Company for some time protested through their respective Brotherhoods to said carrier against this violation of their respective agreements concerning rates of pay, rules, and working conditions. Employees as trainmen of said carrier, in particular, made protest and, as set forth in paragraph 15 of the Stipulation of Facts heretofore filed by the parties herein, notified said carrier that unless this labor dispute, and certain other labor disputes, were settled before 10:30 P. M. January 23, 1946 such employees would go out on strike at that hour. On that date the Brotherhood of Railroad Trainmen, through William Bishop, its Vice-President, and Felix E. Kazmer, General Chairman, Brotherhood of [fol. 157] Railroad Trainmen, The Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company, effected a written settlement with said carrier of this controversy on behalf of the employees as trainmen of said carrier. This settlement was in the form of a written interpretation made under the provisions of the existing agreement described in paragraph 2 above. This settlement interpretation is that referred to in paragraph 15 of the Stipulation of Facts heretofore filed by the parties herein. By the terms of this settlement interpretation said carrier put an end to the practice of permitting employees of other railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of the Defendant The Chicago River and Indiana Railroad Company to points of loading on said lines in the Union Stock Yards, Chicago, Illinois, and, after such cars have been loaded, so to move

the same from said points of loading over the lines of said carrier to lines of said other railroads. Further, as a result of this settlement interpretation, said work was to be performed by the employees as trainmen, engineers, and firemen and enginemen of said carrier. Said work was so performed in accordance with the said settlement interpretation until such employees of the Defendant The Chicago River and Indiana Railroad Company were, on March 14, 1946, without previous notice, enjoined from performing such work by order of the above District Court. The first and only notice or other process relative to any proceedings had in the above suit which was served upon any of the above-named Brotherhoods, or any of their members, was on March 14, 1946, when each of said Brotherhoods was furnished a copy of the preliminary injunction hereafter described.

7. On March 14, 1946 a preliminary injunction was [fol. 158] entered herein commanding The Chicago River and Indiana Railroad Company and its employees to permit certain "foreign" railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of The Chicago River and Indiana Railroad Company to points of loading on that line in the Union Stock Yards and after such cars have been loaded so to move the same from said points of loading over the lines of that carrier to the "foreign" lines.

8. The Chicago River and Indiana Railroad Company and its employees are obeying that injunction and as a result said carrier is again violating the three aforesaid agreements as to rates of pay, rules, and working conditions now in effect between that carrier and its employees as trainmen, engineers, and firemen and enginemen.

9. The said violation of the three aforesaid agreements as to rates of pay, rules, and working conditions has brought widespread dissatisfaction to employees of The Chicago River and Indiana Railroad Company in service as trainmen, engineers, and firemen and enginemen. Such employees are losing work to which they are entitled and wages therefor believed to be in excess of $200 per day. Such employees are, now filing time claims against said carrier arising out of such violation but have been paid nothing

on account thereof and, unless such claims are paid, further dissatisfaction will result among said employees. Affiants believe that these conditions may bring serious results in the operations of said carrier and, in addition, may result in serious consequences to other railroads using the lines of said carrier, all of which may adversely affect the public interest.

10. The Brotherhood has employed the firm of Adams Nelson & Williamson, attorneys at law, 39 South LaSalle [fol. 159] Street, Chicago, Illinois, to represent it in this proceeding and has agreed to pay to said attorneys the reasonable value of their services rendered and to be rendered herein.

Felix E. Kazmer.

Subscribed and sworn to before me this 1th day of May, 1946. Lucile M. Ingham, Notary Public. (Seal.)

[fol. 160] EXHIBIT "A" TO AFFIDAVIT

Rules and Rates of Pay of Yardmen

Chicago Switching District

The Chicago Memorandum of Agreement

[fol. 161] Memorandum of Agreement between Brotherhood of Railroad Trainmen and General Managers' Committee representing the following named railroads:

Atchison, Topeka & Santa Fe Railroad.
Baltimore & Ohio Railroad.
Chesapeake & Ohio Railroad of Indiana.
Chicago & Alton Railroad.
Chicago & Western Indiana Railroad.
Chicago & Northwestern Railroad.
Chicago, Burlington & Quincy Railroad.
Chicago Junction Railroad.
Chicago, Milwaukee & St. Paul Railroad.
Chicago, Indianapolis & Louisville Railroad.
Chicago & Erie Railroad.
Indiana Harbor Belt Railroad.
Illinois Central Railroad.
New York Central Railroad.
New York, Chicago & St. Louis Railroad.

Pittsburgh, Cincinnati, Chicago & St. Louis Railroad.
Pittsburgh, Fort Wayne & Chicago Railroad.
The Belt Railroad of Chicago.
Wabash Railroad.

The following Rates of Pay, Rules and Regulations will apply to yardmen and switchtenders in the Chicago Switching District, and shall be transmitted to the railroads represented, to be incorporated in their individual schedules:

[fol. 162] Article I

Rates of Pay

(a)	Per Day	Overtime Rates Per Hour
Car Retarder Operator	$9.86	$1.84⅞
Foreman	9.06	1.69⅞
Helper	8.54	1.60⅛
Switchtender	6.99	1.30⅞

Where rules of existing schedule agreement provide that switchtenders are paid helpers' rates, such rules will be continued.

Note—Revised rates of pay, effective October 1, 1937, and rate of pay for car retarder operator added to original agreement.

Pilots Pay

(b) Regular pilots will receive not less than yard foremen's pay.

Yardmen required to perform incidental pilot service during the day will receive yard foreman's rate for the entire day's work.

Back-up Pay

(c) Except where passenger back-up work is now performed by passenger train crews, the back-up lead man shall receive yard foremen's rate, and the helpers yard helper's rate.

Passenger back-ups will be handled by one or more men as may be required by the company.

Article II

Basic Day Overtime

(a) Eight hours or less shall constitute a day's work.

(b) Except when changing off where it is the practice to [fol. 163] work alternately days and nights for certain periods, working thru two shifts to change off; or where exercising seniority rights from one assignment to another; or when extra men are required by schedule rules to be used, all time worked in excess of eight hours continuous service in a twenty-four hour period shall be paid for as overtime, on the minute basis at one and one-half times the hourly rate.

Assignments

(c) Yardmen shall be assigned for a fixed period of time which shall be for the same hours daily for all regular members of a crew. So far as it is practicable assignments shall be restricted to eight hours' work.

Article III

Defining Yard Work

(a) The following shall be considered yard work, shall be handled by yardmen and shall be compensated for at not less than yard rates.

(b) The switching of all freight and passenger equipment operating exclusively within the switching limits;

(c) The transfer of all freight and passenger equipment operating exclusively within the switching limits;

(d) The handling of all construction and maintenance of way trains operating exclusively within the switching limits;

(e) The handling of all work trains and milk trains operating exclusively within the switching limits;

(f) The handling of all pay car service operating exclusively within the switching limits (by a regularly assigned yard crew);

(g) All pilot service required for yardmen operating exclusively within the switching limits;

[fol. 164] (h) Where regularly assigned to perform service within switching limits yardmen shall not be used in

road service when road crews are available, except in case of emergency. When yard crews are used in road service under conditions just referred to, they shall be paid miles or hours, whichever is the greater, with a minimum of one hour, for the class of service performed, in addition to the regular yard pay, and without any deduction therefrom for the time consumed in said service.

(i) United States Railroad Administration, Washington, October 24, 1919.

Supplement No. 23 to General Order No. 27

(a) Effective October 1, 1919, employees, (excluding locomotive crane operators and wrecking derrick engineers) who are assigned to operate shop-yard engines will be paid the yard rates of wages and operated under the yard-service rules as are specified in supplements Nos. 15 (engineers and firemen) and 16 (yardmen) to General Order No. 27, and such service shall be incorporated into the respective agreements on all roads in Federal operation.

(b) This order is without prejudice to the seniority rights of employes who are now assigned to shop-yard engines. Only as vacancies occur and new positions are created they will be filled from the seniority rosters of the engineers, firemen and yardmen.

(c) Rates of wages that are higher or rules for overtime that are more favorable to employes than those hereby established shall be preserved.

Walker D. Hines, Director General of Railroads.

Article IV

Pay to Starting Point Reporting and Not Used

(a) Pay of yardmen shall continue until they return to the point at which they started work.

[fol. 165] Yardmen reporting for duty after being called, and not performing service, will be paid for one day. This will not affect the present practice of requiring extra men to report morning and evening to find if work is available.

Pay from Point of Assignment

(b) Extra yardmen will receive compensation from the point of their assignment.

Assigned to Other Duties

(c) Yardmen assigned to other than their regular duties will be paid the established rate for the service performed, but in no case shall a yardman so assigned be paid less than on the basis of their regular rates.

Article V

Lunch Time

(a) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work without deduction in pay.

(b) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

(c) Paragraphs (a) and (b) of this Article apply to switchtenders, but switchtenders will be held responsible for their regular duties during the lunch period.

Article VI

Starting Time

(a) Regularly assigned yard crews shall each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours, advance notice. Practices on individual roads as to handling of transfer crews are not affected by this section.

[fol. 166] (b) Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between 6:30 A. M. and 8:00 A. M.; the second 2:30 P. M. and 4:00 P. M.; and the third 10:30 P. M. and 12:00 midnight.

(c) Where two shifts are worked in continuous service the first shift may be started during any one of the periods named in Section (b).

(d) Where two shifts are worked not in continuous service the time for the first shift to begin work will be between the hours of 6:30 A. M. and 10:00 A. M., and the second not later than 10:30 P. M.

(e) Where an independent assignment is worked regularly the starting time will be during one of the periods provided in Sections (b) or (d).

(f) At points where only one yard crew is regularly employed, it can be started at any time, subject to Section (a).

(g) The time for fixing the beginning of assignments or meal periods is to be calculated from the time fixed for the crew to begin work as a unit without regard to preparatory or individual duties.

Article VII

Consist of Crews

A yard crew shall consist of not less than one foreman and two helpers, and yardmen will not be required to work with less than a full crew as specified above.

Article VIII

Working 16 Hours

Yardmen required to work sixteen hours will resume work when their rest period is up under the law and their pay will begin at their established starting time.

[fol. 167]

Article IX

Allowance for Attending Court, etc.

(a) Yardmen or switchtenders attending court or inquests under instructions from the company will be allowed the same compensation they would have earned had they remained on their regular assignment, plus actual expenses. Extra men so used will be allowed a minimum day, plus actual expenses. Money so earned shall be paid not later than the next regular pay day.

Attending Investigations

(b) Yardmen or switchtenders required by the company to be present as witnesses at investigations, other than those covered by Article XXI, will be paid for all time lost plus expenses.

Re-Examinations

(c) Yardmen or switchtenders who are required to attend re-examinations on Rules and Regulations will, when attending such re-examinations on their own time, be paid their regular hourly rates for the actual time required to be present.

Article X

Seniority Privileges

(a) Seniority rights of yardmen will date from the time they enter the service continuous in yards or terminal where employed.

Yardmen

(b) The right to preference of work and of promotion will be governed by seniority in service. The yardmen oldest in service will be given the preference, if competent.

(c) In the appointment of Yardmasters and Assistant Yardmasters the senior yardman will, in all cases, be given full and unprejudiced consideration.

[fol. 168]

Switchtenders

(d) Seniority rights of switchtenders will date from the time they enter the service continuous in yards or terminal where employed.

(e) The right to preference of work will be governed by seniority in service. The switchtender oldest in service will be given preference providing the applicant is competent.

Article XI

Seniority Lists

(a) Correct seniority lists of yardmen and switchtenders shall be furnished Local Chairmen every ninety days, and copies shall be posted in convenient places in yard offices, to which yardmen and switchtenders shall have access at all times. A list shall also, each thirty days, be given to the Local Chairman showing all names removed from the seniority lists, and the reason for such removal; also a record of men on leave of absence for 30 days or over.

Crew Bulletin

(b) Separate bulletins shall be kept in each yard office upon which assigned crews, switchtenders and extra men shall be registered.

Article XII

Employment

(a) Applications of yardmen and switchtenders for employment, if not satisfactory, will be rejected within thirty days after first service, or applicant will be considered accepted.

Physical Examinations

(b) On roads requiring same, all physical examinations of applicants shall be made without expense to the person examined, unless he shall pass such examination and be [fol. 169] continued in service not less than thirty days. The entire fee for such examination shall not exceed one dollar. The applicant shall be notified within ten days of the result of his physical examination, and if not so notified, he will be considered physically qualified.

Article XIII

Leaving Service

(a) Yardmen or swi-chtenders leaving the service of the company of their own accord forfeit all seniority rights and shall not be reinstated.

Service Letter

(b) Any yardman or switchtender leaving the employ of the company will, at his request, be given a letter by his Division or Terminal Superintendent stating his term of service and capacities in which employed.

Leave of Absence

(c) Yardmen or switchtenders will not be granted leave of absence for a longer period than ninety days, except in case of sickness of himself or member of his family or when serving on the Committee.

Article XIV

Switchtenders Positions

(a) In filling temporary vacancies of switchtenders, and no extra switchtenders available, the senior available extra yardman will be given preference.

(b) In filling vacancies in position of switchtenders, preference shall be given to yardmen disabled in the service of such company, whenever such injuries are not such as to unfit them for such duties. Disabled yardmen desiring to be considered in line for such positions may file application [fol. 170] with the proper officer of the company upon the line where injury was received.

The yardman so disabled or incapacitated will date his seniority as switchtender from the date when permanently disabled or incapacitated in the terminal where employed.

Article XV

Return of Time Slips

(a) When for any reason the time claimed by time slip is not allowed or if the time slips are not made out correctly, they will be promptly returned and the reason given therefor.

Voucher for Omitted Time

(b) Yardmen or switchtenders who are short eight hours or more in their pay will upon request be given a voucher for the amount.

Article XVI

Expense for Notary Fees

When the Company requires that official papers shall be certified by a Notary Public or other court officer, it shall pay ths fee assessed by such officers.

Article XVII

Serving on Committee

Any yardman or switchtender serving on the Committee shall not be discriminated against and shall have leave of absence, upon request, to serve on such committee.

Article XVIII

Cabooses

Yardmen will be furnished cabooses in transfer service, also on other extended runs justifying having cabooses. [fol. 171] A yard crew shall be permitted to switch the

caboose required by this rule to the rear end of the train before commencing a transfer or other extended movement. Cabooses will be equipped with stoves, tools, signal appliances, lamps and such other supplies as are required for the service. Present practice of drawing supplies to continue.

Article XIX

Equipment of Engines in Yard Service

(a) All engines assigned to switching service shall be equipped with headlights, foot boards and proper safety appliances at both ends.

(b) Engines that blow steam, so as to obstruct the observation of signals, shall not be used in yard service.

Article XX

Chaining Cars, Coupling and Uncoupling Hose

(a) Yardmen will not be required to chain up or unchain cars, couple or uncouple hose, in yards or on repair tracks where carmen are employed.

Note:—Under this rule, yardmen will, if necessary to avoid delay, couple air hose between engine and cars.

Handling Cables, Side Boards, Etc.

(b) It will not be the duty of yardmen on work trains to handle cables, side boards, side doors, or to operate weed burners, rail loaders, Lidgerwoods or spreaders.

Article XXI

Charges by Yardmen

(a) When objections or charges are made against any yardman or switchtender by other yardmen or switchtend- [fol. 172] ers they shall be put in writing, and shall convey a full and clear statement of the objections or charges.

Investigations and Hearings

(b) The proper officer of the Company will hear any reasonable complaint made by an individual yardman or switchtender, or any complaint made by the authorized committee

of the B. of R. T. representing same, provided due notice shall be given the Company in writing of the subject of the complaint, and a special appointment made as to the time and place same shall be considered.

(c) Yardmen or switchtenders continued in the service or not censured pending an investigation of an alleged offense shall be notified, within five days after the Company has information of the offense, that a charge is pending. Within five days thereafter an investigation shall be held, if demanded and a decision shall be rendered and made effective within three days after the investigation.

(d) Yardmen or switchtenders taken out of service or censured for cause shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or switchtenders shall have the right to be present, and to have an employe of their choice, at hearings and investigations to hear all oral and to read all written testimony, and to bring out any facts in connection with the case. They shall also have the right to bring such witnesses as they may desire to give testimony and may appeal to a higher officer of the Company in case the decision is unsatisfactory. Such decision shall be made known in writing within three days after the hearing, or yardman or switchtender will be paid for all time lost after expiration of the three days. If, as a result of discipline administered, any exception is taken thereto by the yard- [fol. 173] man or yardmen, switchtender or switchtenders involved, a transcript of all evidence taken at investigation shall be furnished Chairman of Committee upon request, providing the Chairman presents the Company's office with a written request, from the yard man or switchtender disciplined, for such transcript, and a statement of the yardman's or switchtender's reason and contention for believing that the discipline administered is unjust. In case the suspension, dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost.

(e) Yardmen or switchtenders not at fault, required by the Company to be present at investigations as witnesses, will be paid for all time lost.

Article XXII

Employment—Experienced Men

In the employment of yardmen experienced men shall be given preferred consideration.

Article XXIII

Better Conditions or Allowances

Upon roads having better rules, conditions or allowances for men in yard service, the acceptance of this agreement shall not operate as annulment thereof, nor will it abrogate any privilege heretofore enjoyed by yardmen or switchtenders.

Article XXIV

Adjustment of Controversies on Schedule

Any controversy arising as to the application of the rules herein agreed upon to the schedule of the individual roads, between officers, yardmen and switchtenders, shall be taken up by the local committee and the local officials of the indi- [fol. 174] vidual roads. In the event of failure on their part to agree on a satisfactory basis of settlement the Committee of the Brotherhood of Railroad Trainmen, representing the yardmen and switchtenders, may take up the question with the General Manager, and in the event of their failure to agree upon a satisfactory adjustment, the Committee may appeal to the Managers' Committee that has been conducting these negotiations.

Article XXV

It is agreed that the interpretations on the rules contained herein, as handed down by the Commission of Eight and Director General of Railroads, shall remain in force during the life of this agreement.

Article XXVI

Life of This Agreement

The Rules and Rates of Pay herein agreed upon shall remain in effect until revised or abrogated, of which intention thirty days' notice shall be given by the party desiring the change.

Rates of pay effective January 1, 1919 (as revised by arbitration agreements, Eastern and Western Territory, effective December 1st, 1926, and March 1st, 1927, respectively).

Changes in rules due to Supplement 16 to General Order No. 27 effective April 10, 1919.

All other rules effective January 2, 1920.

Signed at Chicago, Illinois, December 20, 1919. For the Railroads: Signed: A. P. Titus, Chairman; F. L. Johnson, W. S. Cooper, W. F. Schaff, W. H. Scriven, W. J. O'Brien, G. B. Vilas, J. J. Pelley, [fol. 175] G. J. Schreeve. For the B. R. T.: Signed: A. F. Whitney, Vice President, B. R. T.; H. R. Sauer, Chairman, Chicago Association, B. R. T.; H. P. Gallagher, Vice Chairman, Chicago Association, B. R. T.; W. W. McKirchy, Secretary, Chicago Association, B. R. T.

The following Questions and Answers are the result of controversies arising as to the proper and literal intent of Rules contained in Chicago Memorandum of Agreement handed down by the Commission of Eight, Director General of Railroads, and Conference Committee of Managers:

Article I

Rates of Pay

Par. (a)

Where rules of existing schedule agreements provide that switchtenders are paid helpers' rates, such rules will be continued.

Question 112. (Interpretation No. 1 to Supplement No. 16 to General Order No. 27.) Are daily rates mandatory, or may rates be expressed in hours?

Decision. Supplement specifies daily rates.

Article II

Par. (b)

Overtime

Except when changing off where it is the practice to work alternately days and nights for certain periods, work- [fol. 176] ing through two shifts to change off; or where

exercising seniority rights from one assignment to another; or when extra men are required by schedule rules to be used, all time worked in excess of eight hours' continuous service in a twenty-four hour period shall be paid for as overtime, on the minute basis at one and one-half times the hourly rate.

Question 119. Interpretation No. 1 to Supplement No. 16 to General Order 27. What compensation should be allowed for additional service where a crew is regularly assigned to work 12:00 midnight to 8:00 A. M. (service performed not affected by exceptions outlined in this rule):

(a) Is required to cover the third shift on the same day—4:00 P. M. to 12:00 midnight?

(b) Is required in an emergency to work 8:30 A. M. to 11:30 A. M.?

(c) Is required in an emergency to work 8:00 P. M. to 12:00 midnight (4 hours) on the same day?

(d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11:00 P. M. and being relieved at 7:00 A. M. and consequently in the 24-hour period works 9 hours, but not more than 8 hours on a shift?

Decision. (a) Eight hours at time and one-half.
(b) Eight hours at time and one-half.
(c) Eight hours at time and one-half.
(d) On account of complying with the 48-hour provision, which makes it permissible to change beginning time, crews only entitled to a minimum day.

Question 120. (Interpretation No. 1 to Supplement No. 16 to General Order No. 27.) An extra man is worked on two eight-hour shifts within the same 24-hour period, or on one eight-hour shift and is started on another shift in the same 24-hour period that spreads into the next 24-hour period. How shall he be paid for such service?

[fol. 177] Decision. It should be understood that under that portion of Article XIV applying to extra men when required to remain on duty in excess of eight hours in continuous service, they will receive overtime at time and one-half on the minute basis. When they start a second trick within a 24-hour period, they will not be paid under the overtime rule, but will start a new day regardless of present rules, and will receive for eight hours or less

straight time rates. The intent of this is not to deprive extra men of extra work, which would result if time and one-half had to be paid for the second shift.

Question 121. What compensation should be allowed an extra man who is called and at 4:00 A. M. relieves a regular man who is covering an assignment 12:00 midnight to 8:00 A. M. and the assignment works until 9:00 A. M.?

Regular yardman working 4 hours.
Extra yardman working 5 hors.
Remainder of crew working 9 hours.
Decision. Extra man will receive a minimum day only.

Article II

Par. (c).

Assignments

(c) Yardmen shall be assigned for a fixed period of time which shall be for the same hours daily for all regular members of a crew. So far as it is practicable assignments shall be restricted to eight hours' work.

Question 125. (Interpretation No. 1 to Supplement No. 16 to General Order No. 27.) If a yard crew was assigned for 10 hours and for some reason was relieved at the expiration of 8 hours what number of hours is to be allowed?

[fol. 178] Decision. A minimum of eight hours. Assignments should be for eight hours and time worked in excess thereof should be paid for as overtime.

Article III

Paragraphs (b), (c) (d) and (e)

Defining Yard Work

(b) The switching of all freight and passenger equipment operating exclusively within the switching limits;

(c) The transfer of all freight and passenger equipment operating exclusively within the switching limits;

(d) The handling of all construction and maintenance of way trains operating exclusively within the switching limits;

(e) The handling of all work trains and milk trains operating exclusively within the switching limits;

February 8, 1917, Conference Committee of Managers ruled on Case No. 2, C. B. & Q. Railroad—request for Interpretation Article III—as follows:

"That the C. B. & Q. Railroad shall discontinue handling freight trains between Center Avenue and Hawthorne with road crews.

"That the railroads will continue handling freight traffic in trains manned by road crews within the switching limits where such practice was established prior to, and has continued in effect since, April 17, 1913, but that no new locations may be established within the switching limits from which road freight crews may run except by mutual understanding between the individual lines and their properly authorized committee."

[fol. 179]

Article IV

Par. (a)

Pay to Starting Point, Reporting, and Not Used

(a) Pay of yardmen shall continue until they return to the point at which they started work.

Yardmen reporting for duty after being called, and not performing service, will be paid for one day. This will not affect the present practice of requiring extra men to report morning and evening to find if work is available.

March 13, 1911, Conference Committee of Managers ruled on Case No. 1, I. H. B. Railroad—violation of Article IV, paragraph (a):

"On July 29th, Conductor Sargent and crew were ordered to leave Gibson at 3:45 P. M. and were tied up at Chappel at 8:35 on the morning of July 30th, being in service 16 hours and 50 minutes. On the return trip they were ordered to leave Clearing at 6:35 P. M., July 30th, and were released at Gibson at 6:25 A. M., July 31st, being in service 11 hours and 50 minutes. Claim was made for 38 hours and 40 minutes, this being the exact time that the crew was out of Gibson. The crew was allowed 28 hours and 40 minutes, the company deducting the time that they were held at Clearing for rest."

Question 1. Has the Company the right under the rule in question to deduct the time that the men were tied up for rest?

Decision. Under a strict interpretation of Article IV (a), as printed, the Conference Committee of Managers must answer your question in the negative.

Article V

Par. (a)

Lunch Time

(a) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work without deduction in pay.

[fol. 180] Question 13. (Supplement "B", Decision No. 1, Commission of Eight.) Paragraphs (a), (b), (d) and (e). Under the several provisions for meal periods, must they be given within the prescribed time?

Answer. Yes. The lunch period must be given and completed within 4½ and 6 hours.

Article V

Par. (b)

Lunch Time

(b) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

Question 2. (Supplement "A", Decision No. 1, Commission of Eight.) If a yard crew, through some unforeseen circumstances, be on duty say 14 hours, would the crew be entitled to a second period in which to eat, and if so, when would it begin?

Answer. Decision No. 1, Article 2, paragraph (e) applies to both the first and second lunch periods. In the case cited, crew would be entitled to the second lunch period 6 hours after completing the first lunch period. In either case, yardmen will not be worked longer than 6 hours without being given an opportunity to eat.

Article VI

Par. (f)

Starting Time

(f) At points where only one yard crew is regularly employed, they can be started at any time, subject to Section (a).

Question 5: (Supplement "A", Decision No. 1, Commission of Eight.) In a certain switching district, engine terminal is located at A. Engines work out of A, switching all day at B—2 miles from A; at C—3 miles, D—4 miles, E—5 miles. Can B, C, D, and E be considered Isolated Yards?

Answer. Crews working out of a common terminal do not come within the exception relating to Isolated Yards.

[fol. 181]

Article VII

Consist of Crews

A yard crew shall consist of not less than one foreman and two helpers, and yardmen will not be required to work with less than a full crew as specified above.

February 8, 1917, Conference Committee of Managers ruled on Case No. 5—Request for Interpretation of Article 7—as follows:

"It is ruled that the language of this Article is plain and specific, and intends that a yard crew in service shall, at all times, consist of not less than one foreman and two helpers, and that yardmen are, under the provision, language and intent of this rule, justified in declining to perform service with less than the required and stated number of men on the crew, and no charge will be placed against a yardman or against yardmen on account of taking such position."

Article IX

Paragraphs (a) and (b)

Allowance for Attending Courts, Etc.

(a) Yardmen or switchtenders attending court or inquests under instructions from the company will be allowed the same compensation they would have earned had they re-

mained on their regular assignment, plus actual expenses. Extra men so used will be allowed a minimum day, plus actual expenses. Money so earned shall be paid not later than the next regular pay day.

Attending Investigations

(b) Yardmen or switchtenders required by the company to be present as witnesses at investigations, other than those covered by Article XXI, will be paid for all time lost plus expenses.

December 18, 1919, Conference Committee of Managers agreed to the following interpretation:

[fol. 182] To the Railroads "Chicago, December 18, 1919.
Members of the Chicago Switching Agreement, B. of R. T.

The Conference Committee of Managers has agreed with Mr. A. F. Whitney, Vice-President of the Brotherhood of Railroad Trainmen, effective this date, to apply the following interpretation on Sections A and B of Article 9, and section E of Article 21 of the Chicago Memorandum of Agreement:

"Yardmen required to report during layover time to give information at inquests or investigations, where they are not at fault, will be paid for time so held, with a minimum of two hours, at regular rates and expenses, this time to commence on arrival at place where investigation is to be held and continue until released.

"Should the yardmen be detained so as to be unable to get ten hours' rest and assume his regular duties he shall be paid for one day, which shall cover his duty time and time lost on assignment.

"It is understood that this interpretation shall only remain in force during the life of the present schedule and is without prejudice to either party in future negotiations.

(Signed) A. P. Titus, Chairman.

Copy to the Members Conference Committee of Managers."

Article XII

Par. (a)

Employment

(a) Applications of yardmen and switchtenders for employment, if not satisfactory, will be rejected within thirty days after first service, or applicant will be considered accepted.

October 6, 1913, Conference Committee of Managers ruled—

"Chicago, October 6th, 1913.

[fol. 188] Ruling of the Managers' Conference Committee on Question Presented by the Brotherhood of Railroad Trainmen, on Schedule Effective April 16, 1913

1. Disagreement between the C. B. & Q. Railroad Company and its yardmen respecting application of Article 12 (a), reading:

"Applications of yardmen for employment, if not satisfactory, will be rejected within thirty days after first service, or applicant will be considered accepted."

Specific Case: On December 24th, 1912, the Company employed a yardman by the name of C. J. Flaherty, to work in its Chicago yards; his service began on date employed and continued until June 2nd, 1913, when he was discharged account employment department refusing to pass his application.

Company contends that as Flaherty was employed before the current agreement was consummated, it was not bound by its terms in his case.

The Committee contends that the agreement in question became effective April 16th, 1913, and did govern the employment of Flaherty, as his application had not been approved at that time, and that its failure to reject said application within thirty days thereafter was tantamount to accepting it.

Ruling: "Article 12 (a) Governs the Application of Yardmen Beginning Service Prior to April 16th, 1913, and Such Applications Should Be Accepted or Rejected Before the Expiration of Thirty (30) Days from the Date the Schedule Became Effective."

Article XX

Par. (a)

Chaining Cars, Coupling and Uncoupling Hose

(a) Yardmen will not be required to chain up or unchain cars, couple or uncouple hose, in yards or on repair tracks where carmen are employed.

[fols. 184-186] Note:—Under this rule, yardmen will, if necessary to avoid delay, couple air hose between engine and cars.

February 8, 1917, Conference Committee of Managers ruled on Case No. 4—Request for interpretation of intent of last sentence of Article XX—as follows:

"The last sentence of Article 20 of the Chicago Switching Agreement states:

"This rule will not apply to coupling or uncoupling between the engine and cars."

The Managers' Conference Committee *are* heartily in accord with all safety principles, and concede that a yardman is entitled at all times, insofar as is consistent and possible, to be sure that as a result of the performance of his duties he is not entailing any unnecessary risk or danger to life or limb.

The Managers' Conference Committee rules:

That a yardman has the right to keep in mind and be governed by safety rules, when such rules are in effect on his line, and is within his rights in insisting on the full observance of such safety rules.

Article XXI

Par. (e)

Investigations and Hearings

(e) Yardmen or switchtenders not at fault, required by the Company to be present at investigations as witnesses, will be paid for all time lost.

Refer to agreement on paragraphs (a) and (b) of Article IX, under date of December 18, 1919.

H. P. Gallagher, Chairman; W. W. McKirchy, H. R. Sauer, B. L. Frederick, Sub-Committee of Chicago Association B. of R. T.

[fol. 187] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY WITH RESPECT TO MOTION OF THE BROTHERHOOD OF RAILROAD TRAINMEN TO INTERVENE AS DEFENDANTS IN THE ABOVE ENTITLED CAUSE—May 29, 1946

The Chicago River and Indiana Railroad Company and The New York Central Railroad Company do not oppose the motion of the Brotherhood of Railroad Trainmen to intervene in this case. They have, since the first proceedings were had in open court (February 21, 1946) with respect to this case, informed the court that these defendants consider such of their employees, as might be affected by the relief prayed in the complaint, necessary parties to this litigation. But these defendants object to certain untrue and misleading statements of fact and incorrect conclusions of law contained in the motion of the Brotherhood of Railroad Trainmen. These statements and conclusions are expressly excluded from the affidavit attached to the motion but are nevertheless of such a character that we should be remiss in our duty to court and counsel were we to permit them to go unchallenged.

These defendants deny that they are under any obligation, legal or otherwise, to represent in this suit the interests of the Brotherhood of Railroad Trainmen, particularly with [fol. 188] respect to any issues as to which the interests of said Brotherhood may conflict with the interests of these defendants. They deny that they have at any time or in any manner sought to lead their employees, or any of their employees' representatives to believe that these defendants would furnish counsel for such employees or that the attorneys for these defendants would represent the Brotherhood of Railroad Trainmen in this suit or follow directions or suggestions given by the attorneys for the Brotherhood of Railroad Trainmen.

These defendants promptly informed the Brotherhood of Railroad Trainmen of the filing of this suit on February 18, 1946. They sent to the Brotherhood of Railroad Trainmen on March 14, 1946, a certified copy of a temporary injunction entered that day by this court. When counsel for the

Brotherhood of Railroad Trainmen on March 18, 1946, in open court requested leave to appear specially, counsel for these defendants objected to such special appearance but suggested that the Brotherhood of Railroad Trainmen appear generally and informed the court that these defendants had no objection to such general appearance.

This court told counsel for the Brotherhood of Railroad Trainmen on March 18, 1946, in connection with their application to appear specially, that if they wanted to file a general appearance in this case they might do so, but it was not until two months later by its notice of motion to appear in court on May 20, 1946, that the Brotherhood of Railroad Trainmen sought to intervene by general appearance.

These defendants deny that under the terms of the agreement described in paragraph 1 of the motion the employees in question are entitled to all work performed by trainmen on the lines of the Chicago River and Indiana Railroad Company.

These defendants deny the innuendo and allegations in [fol. 189] paragraphs 2 and 3 of the motion to the effect that these defendants violated their agreement concerning rates of pay, rules and working conditions.

These defendants deny that the written settlement made on January 23, 1946, was a "settlement interpretation" or a written interpretation of provisions of any previously existing agreement as alleged in paragraphs 3 and 4 of the motion. They object to the improper criticism of this court contained in the last sentence of paragraph 3.

These defendants deny that this suit involves and grew out of a labor dispute and question Brotherhood of Railroad Trainmen counsel's construction of 49 U. S. C. 17 (11).

These defendants deny that they owed any duty to the Brotherhood of Railroad Trainmen to oppose the intervention of the Interstate Commerce Commission as a party plaintiff and on the contrary assert that opposition to such intervention would have been improper.

These defendants admit that their answer was not filed until May 6, 1946, but aver that the filing of such answer at that date could in no respect prejudice the rights of Brotherhood of Railroad Trainmen, and, moreover, a stipulation of facts had previously been filed on February 25, 1946, before the request for a preliminary injunction was considered by this court.

These defendants deny that said stipulation of facts was inadequate or that it omitted any facts necessary to advise the court of the issues then properly before it.

Counsel for these defendants considered the authorities mentioned in paragraph 14 (2) (e), (f) but were not persuaded that they were applicable or decisive of any issues involved in this suit and therefore omitted the same from their brief. The section mentioned in sub-paragraph 2(g) of paragraph 14 was cited in the brief of these defendants (p. 11).

[fols. 190-191] Counsel for these defendants did not inform Brotherhood of Railroad Trainmen counsel that these defendants would file a petition to make the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, or any of them, parties defendant to this suit and have not, in any respect, violated any agreements made with the Brotherhood of Railroad Trainmen or its counsel. The Brotherhood of Railroad Trainmen counsel have no basis for any claim that they were mislead by counsel for these defendants nor any basis for blaming their delay in seeking to intervene herein upon the conduct of these defendants.

Respectfully submitted; Sidney C. Murray, Marvin A. Jersild, Attorneys for The Chicago River and Indiana Railroad Company and The New York Central Railroad Company.

May 29, 1946.

Sidney C. Murray, Marvin A. Jersild, 1236 LaSalle Station, Chicago 5, Illinois. Wab. 4200.

Received a copy of the above Statement this 29th day of May, 1946.

E. S. Ballard, W. F. Price, Pope & Ballard, Attorneys for Plaintiffs. Robert McCormick Adams, Burke Williamson, and Adams, Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen. Ralph M. Shaw, Guy A. Gladson, Bryce L. Hamilton, Winston, Strawn & Shaw, Attorneys for Chicago Junction Railway Company, Defendant.

Gertrude Adam, being duly sworn, says that she served the above Statement upon H. L. Underwood, Attorney for

the Interstate Commerce Commission, Intervening Plaintiff, by depositing a copy in the United States mail, post paid, addressed to him at 3341 I. C. C. Building, Washington, D. C., on the 29th day of May, 1946.

Gertrude Adam.

Subscribed and sworn to before me this 29th day of May, 1946. L. E. Matthews, Notary Public.

[fol. 192] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Transcript of Proceedings—Filed June 14, 1946

[fol. 193] Transcript of proceedings had in the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, in his court room, United States Court House, Chicago, Illinois, on Monday, May 20, 1946.

Present: Mr. Ernest S. Ballard, Mr. H. L. Underwood, Mr. Sidney C. Murray, Mr. Victor Lewis, Mr. Guy Gladson, Mr. Robert McCormick Adams, Mr. Burke Williamson.

[fol. 194] By the Clerk: No. 46 C 275, Baltimore and Ohio Railroad Company et al., against The Chicago River and Indiana Railroad Company, et al. Motion for leave to intervene as defendant and file motion of the Brotherhood of Railroad Trainmen to vacate preliminary injunction, to assess damages against the plaintiffs, and for summary judgment.

Mr. Williamson: If your Honor please, sometime ago I made this same motion by way of a special appearance. I now move, your Honor, for leave to the Brotherhood of Railroad Trainmen to intervene as a party defendant, and will suggest that if that leave is granted we file instanter with your Honor's permission the motion to vacate the preliminary injunction, set it down for hearing.

Mr. Ballard: Plaintiffs are opposed to the motion, if your Honor please, the motion to intervene. A brief has been filed, which was served on us last week, and we would like to have an opportunity to reply to it.

Mr. Williamson: No objection on my part, your Honor.

The Court: What is the necessity for intervention, and what is the interest of the party?

Mr. Williamson: If your Honor please, the motion sets forth, the motion for leave to intervene sets forth that we are entitled to intervene on two separate grounds: First, [fol. 195] because we are indispensable parties and as part of being indispensable parties, we must be here before any action can be taken against us.

The Court: Would any action taken in any event be void?

Mr. Williamson: That was your position when we were here before, and your Honor suggested if we came in on a general appearance that would be satisfactory. That is what we are here to do now, your Honor.

You remember my other motion——

The Court: Either you are or are not indispensable parties. I don't know which position you are taking.

Mr. Williamson: Yes. In addition to the point of being indispensable parties, Rule 24 (a) of the Rules of Civil Procedure gives the right of intervention.

First, your Honor, under a federal statute we have an unconditional right to intervene.

The Court: If you have an unconditional right to intervene, then why don't you file your papers——

Mr. Williamson: I have done that.

The Court: That does not leave anything for me to pass on, does it?

Mr. Williamson: Unless counsel objects, I think there is not.

Mr. Ballard: We object.

[fol. 196] The Court: Suppose they do object. If you have an unconditional right to intervene, you don't have to get an order of court.

Mr. Underwood: On behalf of the Commission, I do not believe the statute they refer to gives them an unconditional right. I think what they are predicating their unconditional right on here is the statute which says they may intervene in the Commission proceedings.

Mr. Williamson: The statute does not say that. It says the representatives of the employees, which is the Brotherhood of Railroad Trainmen, have an unconditional right to intervene because of the fact that they are necessary parties to the proceeding out of which this suit arises.

Under the Interstate Commerce Act, Section 17 (11)—suppose I just read that section to your Honor.

The Court: Yes, I would be glad to hear it.

Mr. Williamson: Title 49, U. S. C. A., Section 17 (11):

> "Representatives of employees of a carrier duly designated as such may intervene and be heard in any proceeding arising under this chapter and Chapters 8 and 12 of this title, affecting such employees."

If your Honor please, the chapter referred to is the Interstate Commerce Act, Section 1, or part 1. The entire [fol. 197] suit is based on that chapter. It involved, if your Honor will recall, an order issued by the Commission. This is certainly, your Honor, a proceeding arsiing under that chapter.

The Court: Is this an enforcement of an order entered by the Commission or is it an effort to invalidate such an order?

Mr. Williamson: The order is for the enforcement, the proceeding is for the enforcement of an order of the Commission.

The Court: Then I must have understood this backwards. I understood this as a situation where the alleged effect of some alternate parties' contract would be to avoid the order of the Commission.

Mr. Ballard: That is true, what counsel says about it being a proceeding for enforcement. We recognize that. But if your Honor will look at the context in which subparagraph 11 appears, you will find it relates entirely to administrative proceedings before the Commission. It is impossible to read that section as giving a right to intervene here except by tearing it from its context.

Also there is the question which would go to the matter of right, as to whether this proceeding affects such em- [fol. 198] ployees. That is a complicated question.

The Court: If it affects them, why didn't you make them parties?

Mr. Ballard: We do not think it affects them in the slightest.

Mr. Williamson: All we know is that we were enjoined from working; so I suppose we must be affected.

The Court: What do you mean?

Mr. Williamson: Your Honor issued an injunction order on March 14th, commanding the employees of the three defendant roads to permit employees of plaintiffs to do the

work which we claim the employees of the defendants are entitled to do.

The Court: Just a minute.

Mr. Williamson: So we certainly are affected.

The Court: How did that order read?

Mr. Williamson: It commanded the employees of the three defendant railroads to permit the plaintiffs' employees to come on the lines of the defendant railroads and perform certain switching work. They have been enjoined, your Honor, since March 14th.

The Court: Where is that order? It sounds very peculiar.

Mr. Williamson: Have you a copy of the preliminary injunction order?

[fol. 199] Mr. Ballard: That is correct, your Honor. It is simply for the reason that in enjoining the railroad it is necessary to enjoin its agents. If you do not enjoin the individuals the order miscarries and it is not enforceable in the sense of the statute under which the complaint is filed here requires the injunction run not only against the corporate defendant but against its agents, representatives, et cetera.

The Court: That is the only way you can ever enjoin a corporation.

Mr. Williamson: In view of counsel's position, I think I should call your attention to 123 F. (2d) 326, which I did not cite in the brief I filed because I did not know counsel would take that position.

That says specifically if the employees of a railroad, or employees in this case of a motor carrier, have a contract with their employer which is involved in an injunction of the type we have here, then those employees are indispensable parties.

And the mere fact, your Honor they are agents of the railroad does not make the ordinary rule with respect to injunction apply. I think undoubtedly Mr. Ballard is correct when he says ordinarily a corporation can act only through its agents.

The Court: You cannot enjoin a corporation any other [fol. 200] way that I know of.

Mr. Williamson: But this case says when the claim is made by the employees that they have a contract right with the corporation being enjoined, then the ordinary rule does not apply, and clearly those employees are indispensable parties to the proceeding.

The Court: It has been several weeks since you gentlemen were in here, and a lot of water has gone over the dam since then; but it is my recollection that I held, or intended to hold, that a contract between private parties could not avoid or evade or invalidate an order of the Interstate Commerce Commission. That was the extent of my holding, or my intended holding. I don't know whether I went further than that or not.

Mr. Williamson: Yes, your Honor did.

The Court: I do not have any present recollection.

Mr. Ballard: I do not think your Honor went any further than that.

The Court: That is as far as I intended to go, and to that position I shall adhere.

Mr. Williamson: We should be permitted to intervene, to raise these points.

The Court: If you have a right to intervene, I want some briefs on it.

Mr. Williamson: I have already filed a brief under Rule [fol. 201] 7, and it was delivered to your Honor five days after service of notice. I think under that same rule counsel for the respondent would have ten days, and I would have five days thereafter.

The Court: That is perfectly all right, but I want some briefs on it. Ordinarily intervention is not permitted unless there is some definite reason for it.

Mr. Ballard: I think we should go to a full hearing on it at any time convenient to your Honor.

The Court: If you are indispensable parties any order the court might make would be void in any event. You don't need to give the matter a second thought. If you want to come in in the position of an amicus curiae——

Mr. Williamson: No. We suggested once before, on special appearance that might be done, but your Honor did not like that.

The Court: No.

Mr. Williamson: We are following your suggestion of a general appearance.

The Court: You are in on general appearance and you filed a motion for leave to intervene?

Mr. Williamson: That has been done.

The Court: Briefs have been filed and they are due on the other side?

Mr. Williamson: Yes.

[fol. 202] Mr. Ballard: May we have until a week from today to file our brief?

The Court: I think that is reasonable. You should be entitled to more than that if you want it.

Mr. Williamson: The only reason for any hurry at all is that the employees have, since March 18th, been enjoined from doing the work they claim they are entitled to, and they are losing about $200 a day.

The Court: They are all going on a strike anyway, so that they won't lose anything.

Mr. Williamson: The bond is only $10,000, which is another reason for hurrying the matter along, I think. The bond will be used up as far as the employees' claims are concerned within a week.

The Court: The employees are not parties to the suit.

Mr. Williamson: They are using the preliminary injunction as a reason for refusing to pay time claims.

The Court: The parties are solvent.

Mr. Underwood: I want to say, on behalf of the Commission, that it takes a neutral position with respect to the intervention, but I call your Honor's attention to the statutory authority relied on, so that it might clear up that point, that it was only a proceeding before the Commission. In making the statement as to our position I do not [fol. 203] want to be understood as admitting or conceding anything contained, a number of things contained in the petition for intervention, for instance, the attitude of the Commission or the right of the Commission, or anything of that sort. I am not conceding that and, as a matter of fact, I think we have a right and we are here solely in the interests of the public in enforcing our own order.

The Court: I took the position and I intend to adhere to the position, that an order of the Commerce Commission cannot be avoided by private contracts between any individuals or groups of individuals or railroad companies, or anybody else. If there is relief wanted from such an order of the Commission it must be obtained in the statutory manner and through the regular channels. That is the holding I made and that I will keep on making.

I do not know what you will file in the way of briefs, but you may as well know it now.

Mr. Ballard: May I suggest May 29th for plaintiffs' brief?

The Court: That is good. That is the day before Decoration Day.

Mr. Williamson: And about five days is all we will need.

The Court: That will be June 5th.

Mr. Williamson: Will your Honor then set it for hear-[fol. 203a] ing now?

The Court: I have to see the briefs first.

Mr. Williamson: May we have oral argument on it before any decision is made? Would that be convenient to your Honor?

The Court: I will look at your briefs first, before I decide that question. You know the frame of mind the Court is in in regard to this matter. If you are prepared——

Mr. Williamson: That is why I should like oral arguments. That is why I think oral arguments would be very helpful, from my standpoint.

The Court: It seems obvious that private parties cannot change an order of the Commission. There are means of reviewing orders of the Commission. If private parties can get together and set aside such an order, you might as well repeal the Interstate Commerce Act in its entirety.

Mr. Underwood: You have stated our position exactly.

The Court: It seems elementary.

Mr. Williamson: The provisions of the Norris-LaGuardia Act take effect even though there has been an order of Commission.

The Court: Did that modify or repeal the Interstate Commerce Act in any of its sections?

[fol. 204] Mr. Williamson: I will say that did.

The Court: Did that say so or are you seeking to argue that by implication?

Mr. Williamson: They refused to enforce the Motor Carrier Act, which is part of the Interstate Commerce Act, and they would not enforce it because of the provisions of the Norris-LaGuardia Act.

The Court: I made my ruling on the preliminary injunction, and I will consider your briefs with great care.

Mr. Underwood: Will you want any from me?

The Court: That is up to you. I don't ever want briefs. If the parties want to file briefs, go ahead.

Mr. Underwood: If I can be of help to the Court——

The Court: I hope you can be.

Mr. Adams: We would like to be heard orally. It is of supreme importance——

The Court: If it is a matter of supreme importance, the quicker you get to the higher court the better off you will be.

Mr. Adams: But we would like a chance to elucidate our reasons.

The Court: Very well.

By the Clerk: In the same case, motion for leave to file instanter answer of the Chicago River and Indiana Rail-
[fol. 205] road Company and the New York Central Railroad Company to complaint of intervention of the Interstate Commerce Commission.

The Court: They have a right to file an answer automatically. You don't need a motion on that.

Mr. Murray: We did not have a rule on us to file an answer.

The Court: Do you have to have a rule to answer?

Mr. Murray: I thought you did.

The Court: Either you have a right to answer, or you haven't. I never heard of anybody being barred from a right to answer yet.

Mr. Murray: All right, Sir.

(Which were all the proceedings had in the above-entitled cause on Monday, May 20, 1946.)

[fols. 206-207] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 208-209] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN—November 7, 1946

This cause having been heretofore taken under advisement on the motion of the Brotherhood of Railroad Trainmen for leave to intervene herein and the Court having considered the briefs of counsel and being fully advised in the premises

It Is Ordered that said motion for leave to intervene be and it is hereby overruled and denied.

[fols. 210-211] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTIONS OF BROTHERHOOD OF RAILROAD TRAINMEN—November 26, 1946

The Court being fully advised in the premises

It Is Ordered that the motion of the Brotherhood of Railroad Trainmen to amend its motion to intervene herein and the motion to vacate the order denying leave to said Brotherhood to intervene be and they are hereby denied.

[fol. 212] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO AMEND ITS MOTION TO INTERVENE AS DEFENDANT AND MOTION TO VACATE ORDER DENYING BROTHERHOOD OF RAILROAD TRAINMEN LEAVE TO INTERVENE—November 26, 1946

To the Honorable Elwyn R. Shaw, Judge of said Court:

Now comes the Brotherhood of Railroad Trainmen, an unincorporated association, hereinafter sometimes referred to as the Brotherhood, and alleges:

1. The Motion of Brotherhood of Railroad Trainmen to Intervene as Defendant was presented to this Court on May 20, 1946. Attached to said Motion was a pleading which set forth the claim or defense for which intervention was sought, which pleading was entitled Motion of Brotherhood of Railroad Trainmen to Vacate Preliminary Injunction, to Assess Damages Against Plaintiffs, and for Summary Judgment.

2. The Brotherhood's said motion to intervene was held under advisement by the Court until November 7, 1946, at which time an order was entered denying the motion of the Brotherhood for leave to intervene.

[fol. 213] 3. Section 45a of Title 28 (Judicial Code and Judiciary) of U. S. C. A. is in part as follows:

"The Attorney General shall have charge and control of the interests of the Government in the cases

specified in section 44 of this title . . . in the district courts, and in the Supreme Court of the United States upon appeal from the district courts . . . Provided further, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof;"

4. Section 44 of Title 28 (Judicial Code and Judiciary) of U. S. C. A., to which reference was made in the above-quoted portions of Section 45a, is in part as follows:

"The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title . . . ."

5. Section 48 of Title 28 (Judicial Code and Judiciary) of U. S. C. A. is in part as follows:

"All cases and proceedings brought under subdivisions 27 . . . of section 41 of this title . . . shall be brought by or against the United States, and the United States may intervene in any case or proceedings whenever, though it has not been made a party, public interests are involved."

6. Subdivision 27 of Section 41 (Judicial Code and Judiciary) of U. S. C. A. grants jurisdiction to the Districts Courts "Of all cases for the enforcement of any order of the Interstate Commerce Commission."

7. The above Sections have not heretofore been brought to the Court's attention in the pleadings and briefs filed herein with respect to the motion of the Brotherhood to intervene.

[fol. 214] 8. The Brotherhood moves for leave to amend instanter so much of paragraph 14 (1) of the Motion of

Brotherhood of Railroad Trainmen to Intervene as Defendant, which appears on page 6 of said document, as reads:

> "14. The Brotherhood has a right to intervene because it is an indispensable party herein and it also has a right to intervene under Rule 24(a) of the Rules of Civil Procedure for District Courts of the United States, as follows:
>
> "(1) A statute of the United States confers on it an unconditional right to intervene (49 U. S. C. A. 17 (11));"

by adding thereto the following designation of statute:

"(28 U. S. C. A. 45a)."

9. The Brotherhood moves for leave to amend instanter the Motion of Brotherhood of Railroad Trainmen to Vacate Preliminary Injunction, to Assess Damages Against Plaintiffs, and for Summary Judgment, which motion is attached to the Brotherhood's motion to intervene, by adding thereto subparagraph (c) in paragraph 1, on page 4 thereof, immediately following the conclusion of subparagraph (b) of paragraph 1, as follows:

> "(c) For failure to comply with the provisions of 28 U. S. C. A. 48."

10. In view of the above statutory provisions, the Brotherhood moves to vacate the order of November 7, 1946 denying the Brotherhood leave to intervene and asks for the [fols. 215-216] entry of an order granting the relief prayed for by the Brotherhood in Motion of Brotherhood of Railroad Trainmen to Intervene as Defendant.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

Dated: November 21, 1946.

[fol. 217] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Transcript of Proceedings—Filed December 9, 1946

[fol. 218] Transcript of proceedings had at the hearing of the above-entitled cause before the Honorable Elwyn R. Shaw, one of the judges of said court, on November 26, 1946.

Present: Mr. Ernest S. Ballard, Mr. Burke Williamson. Other counsel were also present.

[fol. 219] By the Clerk: No. 46 C 275. Baltimore & Ohio Railroad Company, et al., vs. The Chicago River & Indiana Railroad Company, et al. Motion of Brotherhood of Railroad Trainmen to amend motion to intervene, and motion to vacate order denying Brotherhood leave to intervene.

Mr. Williamson: Your Honor recalls on November 7th the Court entered an order denying motion of the Brotherhood of Railroad Trainmen for leave to intervene. Your Honor, since that order was entered by your Honor, we have made an examination of the law and have, I think, your Honor, discovered two sections which have not previously been called to your Honor's attention in connection with a hearing on the motion for leave to intervene. I regret that these matters have not earlier been called to your Honor's attention, but I think as soon as they have been discovered by any party it is the duty of counsel to bring them in.

Your Honor, Section 45a of Title 28 of the Judicial Code and Judiciary of the United States Code Annotated, provides:

> "The Attorney General shall have charge and control of the interests of the government in the cases specified in Section 44 of this title * * * in the district courts,—"

[fol. 220] The Court: What title is this you are talking about?

Mr. Williamson: I am talking about the Judicial Code, Title 28.

The Court: All right.

Mr. Williamson: (Reading:)

"and in the Supreme Court of the United States upon appeal from the district courts. * * * Provided, further, that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; * * *"

Your Honor, Section 44 of Title 28, the Judicial Code, states in part:

"The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in Section 45, 45a, 47a and 48 of this Title * * *."

[fol. 221] Your Honor, it is clear to me that construing those two sections together gives the Brotherhood of Railroad Trainmen, the representative of the employees who have a pecuniary interest in this proceeding, a statutory right of intervention.

I wish to call this to your Honor's attention now and I ask leave to amend the original motion of the Brotherhood to include reference to Section 45 of Title 28 along with the other statutory right of intervention.

Your Honor will recall that the Brotherhood sought leave to intervene as a matter of right, first, because it said it was an indispensable party and, second, because it said that it had an unconditional right to intervene under a statute of the United States, and your Honor will recall that statute was 49 USCA 17(11). I would like to add, your Honor, Title 28 USCA, 45a to the designation of statutory provisions with respect to intervention by the Brotherhood of Railroad Trainmen.

Your Honor, one other matter of procedure has come to our attention. Title 28 USCA, Section 48, provides:

"All cases and proceedings brought under subdivisions 27 and 28 of Section 41 of this title, and Sections

20 and 43 of Title 49 shall be brought by or against [fol. 222] the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved."

Now, your Honor, subdivision 27 of Section 41, to which reference was made, grants jurisdiction to the district courts of all cases for the enforcement of any order of the Interstate Commerce Commission.

Your Honor, it would seem from that section that the Attorney General should have been in charge of the interests of the United States, and not the Interstate Commerce Commission. That, your Honor, has no bearing——

The Court: Then you are not in position to urge it, unless you are permitted to intervene.

Mr. Williamson: That is correct. The reason for that is this: You will recall the rules require any party seeking leave to intervene must attach to his petition for intervention a copy of the pleading which he proposes to file. The Brotherhood attached such a pleading. The amendment concerning this procedural question of whether the Attorney General should have been brought in would simply go as an amendment to the pleading which we attached to our motion to intervene.

I ask leave to the Brotherhood to make those two amend- [fol. 223] ments to the motion for leave to intervene and, after those amendments, I again ask the Brotherhood of Railroad Trainmen be granted leave to intervene herein.

May I make the one suggestion, I have not complied with Rule 7 of the District Court with respect to filing of briefs, and I would suggest, if it meets with your Honor's approval, and counsel have no other ideas, that briefs be waived with respect to this contested motion.

Mr. Ballard: If the Court pleas——

The Court: I do not think you have said anything, Counsel, I have not already considered and passed upon.

Mr. Williamson: Your Honor has not had this matter called to his attention.

The Court: I have a law clerk I have put some labor on, once in awhile, and I think he covered this case pretty well. I think we discussed the matters in chambers that you have mentioned. The right of intervention, if there is any such thing as an absolute right of intervention, would have to

come under the Commerce Act, and it does not come there. The matters you have referred to, in my judgment, refer to proceedings before the Commerce Commission where some order of the Commission tries to affect those rights of outside parties, such as a labor union or a city or a [fol. 224] village or some other group of individuals. In my judgment it does not apply to cases in court.

Mr. Williamson: If you will let me interrupt long enough to read this again, it says "proceedings before the Interstate Commerce Commission or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission."

The Court: This is not a suit brought under those sections.

Mr. Williamson: It was brought under the Interstate Commerce Act, Section 16(11).

The Court: Have you anything more to add to what you said in your briefs?

Mr. Ballard: Very, very little. If your Honor please, I think in the first place there are technical objections to the motion for leave.

This motion is for leave to amend a motion that has been denied, and there is nothing before the Court that can be amended. Counsel has mistaken his remedy.

In the second place, it seems to us that the laches of which the Brotherhood has been guilty are inexcusable. This matter has been before the Court in one form or another since the 18th of March, when counsel asked to file a brief as a friend of the court, and your Honor denied it, and [fol. 225] said: "If you will file a motion to intervene, I will take it under advisement," and they spent two months preparing their motion to intervene, and your Honor had it under advisement from May until November. Now, after it is disposed of, they come in and ask leave to amend it.

With respect to the merits, I think your Honor has said all that is necessary to say. Even if the section of the Code which counsel now cites is applicable, which we deny, it requires that they show an interest. The question of whether they had an interest or not was involved in their first motion and was disposed of by your Honor's ruling denying that motion. So our position is that both

the motion—well, put it this way: That the motion for leave to amend should be denied. If you should grant the motion for leave to amend, then the amended motion should be denied on the ground it has been disposed of by the ruling on the original motion, because no new right has been shown.

Mr. Williamson: I would simply like to be heard on the question of laches. Your Honor will recall we came in here immediately after the issuance of the injunction by your Honor against the employees, and sought leave as——

The Court: Did I issue an injunction against the employees?

[fol. 226] Mr. Williamson: Yes, sir, you did. It is still standing.

The Court: I don't think so.

Mr. Williamson: That is what your Honor did on March 15th.

The Court: What was that injunction?

Mr. Ballard: It runs against the servants, agents, et cetera, of the Chicago River & Indiana.

Mr. Williamson: And it specifically says employees, your Honor.

The Court: Now, just a minute. That isn't that broad and it is not intended to be that broad and it was not written that way. It is the usual form of injunction. What you did was come in trying to upset an order of the Commerce Commission by an indirect attack, and that is what I enjoined everybody against doing. That is all I did do. That is the way the matter stands and that is the way it will keep on standing until somebody does something about it.

Your motion will be denied.

Mr. Williamson: We had two motions: For leave to intervene——

The Court: That motion is denied, and the motion for leave to amend is denied.

Mr. Williamson: Your Honor, may the Clerk stamp the motion?

[fol. 227] The Court: He may mark it presented, if you wish.

Mr. Williamson: Whichever is better. If we file the motion and you deny it, that is all in the record.

The Court: He may mark it presented; but leave to file it is denied. That saves your record.

[fols. 228-229] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 230] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION OF BROTHERHOOD OF RAILROAD TRAINMEN FOR APPEAL TO SUPREME COURT OF THE UNITED STATES FROM ORDER DENYING LEAVE TO INTERVENE—Filed January 6, 1947

To the Honorable Elwyn R. Shaw, Judge of Said Court, or to Any Other Judge of Said Court:

Now comes petitioner, the Brotherhood of Railroad Trainmen, an unincorporated association, and respectfully shows:

1. Petitioner is acting herein in a representative capacity for employees as trainmen of the defendant The Chicago River and Indiana Railroad Company.

2. On May 20, 1946 petitioner presented to this Court its written motion to intervene as a defendant herein, and represented by said motion that it was entitled to intervene as of right because it is an indispensable party herein and because its unconditional right to intervene is provided by United States statute.

3. On November 7, 1946 an order was entered by this Court denying said motion to intervene.

4. On November 26, 1946 petitioner presented herein its written motion to amend said motion to intervene and to vacate said order denying intervention, both of which motions made on November 26, 1946 were denied, and said [fols. 231-232] order of November 7, 1946 has remained and is in full force and effect, and is in all respects a final order.

5. Petitioner is aggrieved by said order of November 7, 1946, and wishes to appeal therefrom to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith.

Wherefore, petitioner prays that an appeal to the Supreme Court of the United States be allowed from said order of November 7, 1946; that a citation — issued herein; and that a transcript of the record, proceedings, and papers on which said order was based be made and duly authenticated and sent to the Supreme Court of the United States. Petitioner further prays for an order fixing the amount of its appeal bond herein.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

Dated: January 4, 1947.

[fol. 233] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 6, 1947

The Brotherhood of Railroad Trainmen, an unincorporated association, applicant to intervene in the above-entitled cause, files the following assignment of errors upon which it will rely in the prosecution of an appeal petitioned for by it in said cause from the order of this Court entered on the 7th day of November, 1946, denying the motion of the Brotherhood of Railroad Trainmen to intervene herein:

1. The District Court erred by its order entered herein on November 7, 1946 denying the motion of the Brotherhood of Railroad Trainmen, as representative of employees as trainmen of the defendant The Chicago River and Indiana Railroad Company, to intervene in this suit in that said employees had and have a contract right to perform certain work for said defendant railroad, which work this suit seeks to enjoin said employees from performing, wherefore said employees, or their representatives, are indispensable parties in this suit, and, as such, have an absolute right to intervene herein.

2. The District Court erred by said order denying the said motion to intervene in that an unconditional right to [fol. 234-243] intervene is conferred on the Brotherhood of

Railroad Trainmen as representative of said employees as trainmen by Federal statute, to-wit: 28 USCA 45a; 49 USCA 17 (11).

3. The District Court erred by said order denying the said motion to intervene in that the representation of the interest of said employees as trainmen by other parties herein is inadequate within the meaning of Rule 24(a) of the Rules of Civil Procedure of District Courts of the United States and said employees as trainmen are expressly bound by the preliminary injunction issued herein from performing the said work to which they are entitled by contract as aforesaid, and are or may be bound by a judgment in the suit within the meaning of said Rule.

Wherefore, for which errors the Brotherhood of Railroad Trainmen prays that said order entered November 7, 1946 by the District Court denying the motion of said Brotherhood to intervene be reversed, and prays for such other and further relief as to the Court may seem just and proper.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

Dated: January 4, 1947.

[fol. 244] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL TO SUPREME COURT OF THE UNITED STATES—January 6, 1947

The Brotherhood of Railroad Trainmen having this day filed and presented herein its petition to appeal to the Supreme Court of the United States from the order entered by this Court on November 7, 1946 denying the motion of said Brotherhood of Railroad Trainmen to intervene as a defendant herein, and this Court having considered said petition to appeal, together with the assignment of errors and the jurisdictional statement filed and presented herein accompanying said petition;

It Is Ordered that the appeal of the Brotherhood of Railroad Trainmen to the Supreme Court of the United States from the order entered by this Court on November 7, 1946 denying the motion of said Brotherhood of Railroad Trainmen to intervene as a defendant herein be and it is hereby allowed; that a citation issue herein; and that a transcript of the record, proceedings and papers on which said order was based be made and duly authenticated and sent to the Supreme Court of the United States.

[fols. 245-246] It Is Further Ordered that the bond on this appeal be and it is hereby fixed at the sum of $250.00.

Dated: January 6, 1947.

Elwyn R. Shaw, District Judge.

[fols. 247-248] In the District Court of the United States

[Title omitted]

Order Approving Appeal Bond—January 6, 1947

The appeal bond of the Brotherhood of Railroad Trainmen having this day been presented herein and the Court having examined the same;

It Is Ordered that said bond be and it is hereby approved.

Dated: January 6, 1947.

Shaw, District Judge.

[fols. 249-255] Bond on appeal for $250.00 approved and filed Jan. 6, 1947, omitted in printing.

[fols. 256-258] Citation in usual form showing service on H. L. Underwood, et al., filed Jan. 10, 1947, omitted in printing.

[fol. 259] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Transcript of Proceedings—Filed January 16, 1947

[fol. 260] Transcript of proceedings had in the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, on January 6, 1947.

Present: Mr. Ernest S. Ballard, Mr. Robert McCormick Adams, Mr. Burke Williamson.

[fol. 261] By the Clerk: No. 46 C 275, Baltimore & Ohio Railroad Company vs. Chicago River & Indiana Railroad Company. Motion for order allowing appeal to the Supreme Court, fixing amount of approval bond, and issuance of citation.

Mr. Williamson: Your Honor may recall in this case an order was entered by your Honor denying intervention to the Brotherhood of Railroad Trainmen on November 7, 1946. This, your Honor, is a petition under the statute for appeal to the Supreme Court. Your Honor, I think the amount of bond, which is for costs only since no supersedeas is involved, should be about $250.

The Court: Why should it go directly to the Supreme Court? Why not to the Circuit Court of Apeals?

Mr. Williamson: We may not go to the Circuit Court of Appeals, under Section 225, if an appeal may be taken to the Supreme Court, and under Sections which have been cited here in the jurisdictional statement, I think it is very clear we should go to the Supreme Court of the United States.

The Court: I don't suppose the bond will make much difference.

Mr. Williamson: I don't think so.

Mr. Ballard: No, but I oppose the petition on its merits, and I would like to state briefly the grounds.

This appeal is not a matter of right, and upon presenta-
[fol. 262] tion of this petition to this court it is the function of this court to consider whether the order appealed from is or is not appealable. It is not sufficient that the papers be in order. They are in order. We do not deny that, and we do not deny that the Brotherhood has a right to take this appeal if the order it is appealing from is final; but it seems perfectly clear from the authorities that it is not

a final order, inasmuch as it was a denial of a petition for leave to intervene, the granting or denial of which was within the discretion of this court.

On the main proposition that this court is called upon at this time to pass upon, the question of the appealability of the order from which this appeal is sought to be taken, I would like to call your Honor's attention to the case of Alaska Packers Assn. vs. Pillsbury, etc., et al., 301 U. S. 174, in which the Supreme Court said:

> "While an appeal in a proper case is a matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made."

I would like to suggest further——

[fol. 263] The Court: Does that depend upon the existence of probable cause or——

Mr. Ballard: No, it depends on the finality of the order.

Mr. Williamson: I would be glad to go into this but, frankly, the very purpose of the appeal is to decide whether your Honor was correct in denying us intervention, and to say that it is a matter of discretion in the lower court is completely incorrect.

Your Honor, the statute gives the right to appeal and, obviously, there is no point in arguing again the merits of the case here before your Honor.

The Court: Certainly not. I have decided the merits so far as the intervention is concerned. That is the only order I could make under the petition for leave to intervene, either to grant it or to deny it. I don't know of any other course open, and I denied it because I did not think there was any right to intervene under the statute.

On the question of appeal, I don't know what there is for me there to pass on. Either you have or you have not the right to appeal.

Mr. Williamson: The function of the court this morning is ministerial. You are to look at the papers and nothing——

[fol. 264] The Court: That is the way it seems to me, unless I have other power.

Mr. Williamson: That is all you have. I would be glad to go into the powers here——

Mr. Ballard: I think the authorities are clearly to the contrary.

The Court: Let's hear what you have to say. I will listen to you.

Mr. Ballard: The basic proposition here, that your Honor's function is not merely ministerial, is squarely established by the Alaska Packers case, that the question of the right to appeal is not for the petitioner, but for your Honor, and that you do not perform the ministerial act of seeing whether the papers are in order, but you determine whether the appeal will lie. It will lie only if the order sought to be appealed from is final.

The Court: It is final, as far as these people are concerned. It is final as to them.

Mr. Williamson: That is the whole purpose of the appeal. If we cannot review your Honor's order, we are through.

Mr. Ballard: There is another——

The Court: That is about as final an order as there could be.

Mr. Ballard: Not in the sense here involved. There is [fol. 265] square authority for that.

There is a case identical with this, which was before Judge Wilkerson, which is reported in 15 F. (2d) 443, in which he said in so many words:

> "An order denying such an application (that is, one which appeals to the discretion of the court) does not possess the element of finality, and is not appealable."

And he denied leave to appeal in that case, and he pointed out what the petitioner's remedy is. The petitioner has a remedy. He won't be left remediless. He has a right to appeal to the Supreme Curt for a mandamus on your Honor to grant the petition for leave to appeal.

The Court: That would make two cases for the Supreme Court, instead of one.

Mr. Ballard: But it would let this case proceed.

The Court: It is bad enough to throw one in their lap unnecessarily, but to put two of them there——

Mr. Ballard: But the court says it is entitled to your Honor's judgment as to whether this is an appealable order, and it cannot be an appealable order, which is plain from what is called the California Canneries case, 279 U. S. 553.

> "It (referring to the lower court) did not refer to the [fol. 266] decisions which hold that an order denying

leave to intervene is not appealable, (citing cases), except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit, (citing a number of cases)."

The two cases counsel cites here have no relation to this situation at all. The case they rely on in the Supreme Court is a case where there had been a consent decree which created property rights in the party that was seeking leave to intervene. So it was like a proceeding *in rem*, where there was property in the possession of the court, that intervener had a right to assert a claim to, and if he did not intervene and assert the claim he would have been forever barred.

In the other case that petitioner relies on, title to tidal flats was in issue, exactly like a proceeding *in rem* where the *res* was in the possession of the court, and if the State of California had not been permitted to intervene and assert its rights it would have been cut off permanentlly.

Mr. Williamson: If your Honor please, in answer to Mr. Ballard, all of the arguments which he has made are proper to be made in the Supreme Court by a motion to dismiss the appeal, which I have no doubt he will do.

The Court: A motion to dismiss the appeal?

[fol. 267] Mr. Williamson: Yes. In the case of United States vs. Hancock Truck Lines, 324 U. S. 774, 89 L. Ed. 1357, Justice Roberts said, in passing on one of these points:

"Since appeal is of right, allowance would seem to be but a ministerial act which might be performed by any member of the court."

The Court: If the appeal is of right there is no doubt about that. What statute makes the appeal a matter of right?

Mr. Williamson: I refer your Honor to the jurisdictional statement pursuant to the Supreme Court Rule 12. It appears at 28 U. S. C. A. 345, your Honor.

The Court: Is that the page or the section number?

Mr. Williamson: Section number. That is Section 238 of the Judicial Code.

"Appellate jurisdiction from decrees of United States district courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree

of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

"• • •

"(4) So much of Sections 47 and 47a of this title as relates to the review of interlocutory and final judg-
[fol. 268] ments and decrees in suit to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

The Court: Do you contend this is a suit to set aside an order of the Interstate Commerce Commission?

Mr. Williamson: No, to enforce it. Mr. Ballard seeks to enforce compliance with the order of the Interstate Commerce Commission, and does not ask for the payment of money in connection with that order.

The Court: I thought this was for injunction to restrain violation of an order of the Commerce Commission.

Mr. Williamson: He seeks enforcement.

Mr. Ballard: I think there is a question as to which is the type of suit, although that is not the point on which I rely here. The petitioner does not bring himself within the basic requirements of this provision. It says:

"A direct review by the Supreme Court of an interlocutory or final judgment • • •."

This is neither an interlocutory nor final judgment. This is simply an exercise of this court's discretion.

Mr. Williamson: This is a final order as far as the Brotherhood is concerned.

The Court: Was my granting or refusal to grant inter-
[fol. 269] vention a matter of discretion?

Mr. Williamson: No, sir.

Mr. Ballard: Clearly.

Mr. Williamson: We relied on statutes.

The Court: That is the point of the whole thing, whether my original order was a matter of discretion. I do not think it was. I think it was mandatory on me to permit intervention if it was proper, and mandatory on me to deny it if it was improper.

Mr. Williamson: That is correct.

Mr. Ballard: The former is correct, but not the latter. There is a broad class of cases in which intervention is discretionary, and this is such a case.

Mr. Williamson: We relied on statutes. Your Honor found the statutes were not applicable. Therefore, it was either a matter of right or it was not.

The Court: I understood that it was not a matter of discretion where they were allowed to intervene. If it were discretionary I would have denied it on the ground there was no showing that their interests were not properly represented by the other parties of record. I still think it is true——

Mr. Ballard: I would agree with that, but it seems to me once you have disposed of the question of whether it is a matter of right you are still confronted with the question as to whether you will exercise your discretion to permit in-
[fol. 270] tervention.

The Court: If it were a matter of discretion I would have denied it because there was no showing the parties seeking to intervene were not properly represented by other parties of record, but I passed on it as a question of right.

Mr. Williamson: We sought intervention under Rule 24(a) of the Rules of Civil Procedure.

The Court: Yes, and under some rules of the Interstate Commerce Commission.

Mr. Williamson: Yes.

The Court: I do not think it was a matter of discretion on my part.

Mr. Ballard: I agree, but you could have gone further and let them in within your discretion.

The Court: They did not ask to come in on any such ground as that. They made no showing——

Mr. Ballard: If I am not mistaken, I think they made both points.

Mr. Williamson: The original petition made both points, but we abandoned the point of discretion.

The Court: You made no showing that there would not be proper representation.

Mr. Ballard: It was argued at length.

Mr. Williamson: Even under Rule 24(a) it was not a
[fol. 271] matter of discretion.

The Court: Your petition to intervene did not come in under either the rule or the statute.

Mr. Williamson: That was your decision.

The Court: That was not a matter of discretion. That was a matter of definite ruling on a question of law.

Mr. Ballard: May I suggest at this point: That ruling I think is controlling on the merits of this petition. If they had no right to intervene in here they have no right to appeal.

The Court: That is perfectly true——

Mr. Williamson: That is what we want to find out.

Mr. Ballard: And the Supreme Court is entitled to the decision of this court on that question.

The Court: I have given you my decision on that.

Mr. Ballard: I mean on this petition the Supreme Court is entitled to your Honor's decision.

Mr. Williamson: As your Honor pointed out, Congress gave us the right to appeal.

The Court: If you have the right to appeal, you have it because my ruling was a matter of ruling on the law, and not a matter of discretion.

Mr. Williamson: Yes.

The Court: As I see it, you have your right to file your appeal in the Supreme Court and the opposing parties have [fol. 272] a right to file a motion to dismiss that appeal if they disagree with this. I will enter the order.

I think $200 bond is sufficient.

Mr. Williamson: I have one for $250.

The Court: Will you file a transcript of this conversation so that the Supreme Court has some idea of what we are talking about this morning?

Mr. Williamson: Yes, I will see it gets in the record, your Honor.

The Court: All right.

[fols. 273-274] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 275] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 10, 1947

To the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

Please prepare a Transcript of Record to be certified and transmitted to the Supreme Court of the United States pursuant to the appeal heretofore taken in this cause, and include therein the following:

1. Complaint.

2. Order granting leave to file amendment to complaint;

3. Amendment to complaint herein pursuant to leave of court;

4. Complaint of intervention of Interstate Commerce Commission;

5. Stipulation of facts dated February 25, 1946;

6. Preliminary injunction;

7. Motion of Brotherhood of Railroad Trainmen for leave to file special appearance;

8. Motion of Brotherhood of Railroad Trainmen to vacate temporary injunction and to dismiss proceedings for failure to join indispensable parties;

9. Transcript of proceedings before Hon. Elwyn R. Shaw, Judge, March 18, 1946;

10. Order of March 18, 1946 denying leave to file special appearance and denying leave to file motion to vacate temporary injunction, etc.

11. Answer of defendants, the Chicago River and Indiana Railroad Company (herein called the River Road) and [fol. 276] The New York Central Railroad Company (herein called the Central) to Plaintiffs' Complaint as amended;

12. Motion of Brotherhood of Railroad Trainmen to intervene as defendant, including motion of Brotherhood of Railroad Trainmen to vacate preliminary injunction, to assess damages against plaintiffs, and for summary judg-

ment, including affidavit of Felix E. Kazmer and Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement;

13. Transcript of Proceedings Before Hon. Elwyn R. Shaw, Judge, May 20, 1946;

14. Statement of the Chicago River and Indiana Railroad Company and The New York Central Railroad Company with respect to motion of the Brotherhood of Railroad Trainmen to intervene as defendants in the above entitled cause;

15. Order of November 7, 1946 denying Brotherhood of Railroad Trainmen leave to intervene;

16. Motion of Brotherhood of Railroad Trainmen to amend its motion to intervene as defendant and motion to vacate order denying Brotherhood of Railroad Trainmen leave to intervene;

17. Order of November 26, 1946 denying above motions;

18. Transcript of proceedings before Hon. Elwyn R. Shaw, Judge, November 26, 1946;

19. Petition of Brotherhood of Railroad Trainmen to appeal to Supreme Court of the United States from order denying leave to intervene;

20. Assignment of errors for appeal by Brotherhood of Railroad Trainmen from order denying intervention;

21. Jurisdictional statement pursuant to Supreme Court Rule 12;

22. Order allowing appeal to Supreme Court of the United States from order denying leave to intervene;

23. Bond on Appeal;

24. Order approving appeal bond;

25. Proof of Service of copy of petition for and order allowing appeal, together with a copy of the assignments of error and jurisdictional statement pursuant to Rule 12 of the Supreme Court, and statement directing attention to the provisions of paragraph 3 of Rule 12 of the Supreme Court;

26. Citation and proof of service;

27. Praecipe and proof of service;

28. Clerk's certificate;

[fol. 277] 29. Transcript of Proceedings Before Hon. Elwyn R. Shaw, Judge January 6, 1947.

and such other matters as, under the rules of the Supreme Court of the United States, you may be required to certify.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, 39 South LaSalle Street, Chicago 3, Illinois, Franklin 2411. E. Douglas Schwantes, 175 West Jackson Boulevard, Chicago 4, Illinois, Harrison 4060, Attorneys for Brotherhood of Railroad Trainmen.

Dated: January 8, 1947.

Service of the foregoing Praecipe for transcript of record and the receipt of a copy thereof are hereby acknowledged this 9th day of January, 1947.

Ernest S. Ballard, William F. Price, Walter I. Deffenbaugh, Pope & Ballard, By Walter I. Deffenbaugh, Counsel for Plaintiffs-Appellees. Sidney C Murray, Marvin A. Jersild, By Sidney C. Murray, Marvin A. Jersild, Counsel for certain Defendants-Appellees. Ralph M. Shaw, Guy A. Gladson, Bryce L. Hamilton, Winston, Strawn & Shaw, By Ralph M. Shaw, Guy A. Gladson, B. P. Hamilton, Counsel for certain Defendant-Appellee.

[fols. 278-300] District of the United States,
State of Illinois,
County of Cook, ss:

Lucile M. Ingham, being first duly sworn, deposes and says that she served the foregoing Praecipe for transcript of record on H. L. Underwood, counsel for Interstate Commerce Commission, Intervening Plaintiff-Appellee, 3341 Interstate Commerce Commission Building, Washington, D. C., by depositing in the United States mail, postage prepaid, a copy thereof in an envelope duly sealed and addressed to said H. L. Underwood at said address, on the 8th day of January, 1947, at Chicago, Illinois.

Lucile M. Ingham.

Subscribed and Sworn To before me this 8th day of January, 1947. Agnes Stasio, Notary Public. (Seal.)

[fol. 301] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 302] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON AND DESIGNATION OF RECORD FOR PRINTING—Filed January 31, 1947

Statement of Points

Apellant, Brotherhood of Railroad Trainmen, on its appeal to the Supreme Court of the United States from the order denying intervention entered by the District Court November 7, 1946, intends to rely on the following points:

1. The District Court erred in failing and refusing to hold that the employees as trainmen of the defendant The Chicago River and Indiana Railroad Company, by reason of [fol. 303] their contract with said railroad providing for performance by them of work which this suit seeks to enjoin them from performing, have rights and interests in the subject matter of this suit which cannot be adjudicated without making said employees parties, and that said employees or their representative is therefore an indispensable party to this action.

2. The District Court erred in failing and refusing to hold that the issuance of a preliminary injunction in this proceeding, enjoining the employees of defendant The Chicago River and Indiana Railroad Company from doing work which they were then doing and depriving them of such employment, gives to said employees, or their representative, such an interest in the subject matter of this suit as can be protected only by intervention herein.

3. The District Court erred in failing and refusing to hold that the Brotherhood of Railroad Trainmen, as representative of employees as trainmen of defendant The Chicago River and Indiana Railroad Company, is entitled of right to intervene herein for the purpose of moving to vacate the preliminary injunction issued against such employees without compliance with the Federal statutes relating to injunctions in labor disputes, and moving to assess damages against plaintiffs, and moving for summary judgment.

4. The District Court erred in failing and refusing to hold that the Brotherhood of Railroad Trainmen, as representative of indispensable parties not joined in this suit,

has an absolute right to intervene and be made a party herein.

5. The District Court erred in failing and refusing to hold that the Brotherhood of Railroad Trainmen is entitled to intervene of right under Rule 24(a) (1) of the Rules of Civil Procedure for District Courts of the United States in that statutes of the United States confer an unconditional [fol. 304] right to intervene, as follows:

(a) Section 17 (11) of the Interstate Commerce Act, Chapter 1 (49 U. S. C. A. Sec. 17 (11)) provides that representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under that Chapter affecting such employees.

(b) Sections 212 and 213 of the Judicial Code (28 U. S. C. A. 45a) provide that associations interested in a suit brought by anyone relating to action by the Interstate Commerce Commission may at any time intervene in said suit.

6. The District Court erred in failing and refusing to hold that the Brotherhood of Railroad Trainmen, as representative of employees as trainmen of the defendant The Chicago River and Indiana Railroad Company, is entitled to intervene of right under Rule 24(a) (2) of the Rules of Civil Procedure for District Courts of the United States in that representation by existing parties of the interests of such employees is inadequate and such employees are or may be bound by a judgment in this action.

7. The District Court erred in failing and refusing to hold that the provision of the Interstate Commerce Act, Chapter 1 (49 U. S. C. A. Sec. 5 (2) (f)) guaranteeing to employees of a railroad carrier, acting through their duly authorized representative, the right to enter into agreements with said carrier for the protection of the interests of said employees is applicable to the settlement agreement of January 23, 1946 made by the Brotherhood of Railroad Trainmen on behalf of employees as trainmen of defendant The Chicago River and Indiana Railroad Company, and that the interests of said employees under their said agreement, which is sought to be nullified by this suit, [fol. 305] can be protected only by allowing their representative to intervene herein.

Designation of Record

Appellant deems the entire record, as filed in this Court, necessary for the consideration of the points relied on.

Dated: January 23, 1947.

E. Douglas Schwantes, Counsel for Appellant, 175 West Jackson Boulevard, Chicago 4, Illinois, Harrison 4060.

Service of the foregoing STATEMENT OF POINTS RELIED ON and DESIGNATION OF RECORD FOR PRINTING and the receipt of a copy thereof are hereby acknowledged this 23rd day of January, 1947.

Ernest S. Ballard, William F. Price, Walter I. Deffenbaugh, Pope & Ballard, by Pope & Ballard, Counsel for Plaintiffs-Appellees. Sidney C. Murray, Marvin. A. Jersild, by Marvin A. Jersild, Counsel for certain Defendants-Appellees. Ralph M. Shaw, Guy A. Gladson, Bryce L. Hamilton, Winston Strawn & Shaw by Winston Strawn & Shaw, Counsel for certain Defendant-Appellee.

[fol. 306] DISTRICT OF THE UNITED STATES,
State of Illinois,
County of Cook, ss:

LUCILE M. INGHAM, being first duly sworn, deposes and says that she served the foregoing STATEMENT OF POINTS RELIED ON and DESIGNATION OF RECORD FOR PRINTING on H. L. UNDERWOOD, counsel for Interstate Commerce Commisson, Intervening Plaintiff-Appellee, 3341 Interstate Commerce Commission Building, Washington, D. C., by depositing in the United States mail, postage prepaid, a copy thereof in an envelope duly sealed and addressed to said H. L. Underwood at said address, on the 23rd day of January, 1947, at Chicago, Illinois.

Lucile M. Ingham.

Subscribed and sworn to before me this 23rd day of January, 1947. Agnes Stasio, Notary Public. (Seal.)

[fol. 306a] [File endorsement omitted.]

[fol. 307] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 970

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—March 3, 1947

The statement of jurisdiction in this case having been submitted, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Endorsed on Cover: File No. 51,834. Northern Illinois, D. C. U. S., Term No. 970. Brotherhood of Railroad Trainmen, an Unincorporated Association, Appellant vs. The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, et al. Filed January 31, 1947. Term No. 970 O. T. 1946.